IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
May 6, 2003 Session

STATE OF TENNESSEE v. ROBERT FAULKNER

Direct Appeal from the Criminal Court for Shelby County
No. 99-07635 Chris Craft, Judge

No. W2001-02614-CCA-R3-DD - Filed September 26, 2003

Defendant Robert Faulkner appeals as of right his conviction for first-degree murder and resultant sentence of death arising from the January 1999, murder of his wife, Shirley Faulkner. A Shelby County jury convicted Defendant of first-degree premeditated murder. Following a separate sentencing hearing, the jury found the proof supported one aggravating circumstance beyond a reasonable doubt, *i.e.*, the defendant had been previously convicted of one or more violent felonies, Tenn. Code Ann. § 39-13-204(i)(2), determined that the aggravating circumstance outweighed any mitigating circumstances beyond a reasonable doubt, and sentenced the Defendant to death. The trial court approved the sentencing verdict. Defendant appeals, presenting for our review the following issues: (1) the trial court improperly excluded testimony regarding the Defendant's diminished capacity; (2) the trial court improperly permitted the introduction of numerous gruesome photographs of the homicide victim; (3) the trial court improperly instructed the jury; (4) the indictment failed to charge a capital offense; (5) the death penalty violates treaties which have been ratified by the United States, and violates established international law; (6) the Tennessee death penalty sentencing statute and the imposition of death are unconstitutional; and (7) the criteria of Tenn. Code Ann. § 39-13-206(c)(1) have not been satisfied in this case. After review, we find no error of law requiring reversal. Accordingly, we affirm the Defendant's conviction for first-degree murder and the jury's imposition of the sentence of death in this case.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES and JOHN EVERETT WILLIAMS, JJ., joined.

Robert C. Brooks, Memphis, Tennessee, for the appellant, Robert Faulkner.

Paul G. Summers, Attorney General and Reporter; Gill Geldreich, Assistant Attorney General; William L. Gibbons, District Attorney General, and Phillip Gerald Harris and Jennifer Nichols, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The Shelby County Grand Jury returned an indictment charging forty-three-year-old Defendant Robert Faulkner with the premeditated murder of Shirley Faulkner. Subsequently, the State filed notice of its intent to seek the death penalty. Pursuant to a court order, Defendant was evaluated by Midtown Mental Health Center to determine (1) the Defendant's competency to stand trial and (2) the Defendant's mental capacity at the time of the offense. The evaluation revealed that Defendant was able to appreciate the wrongfulness and nature of his alleged behavior. It was further determined that Defendant was competent to stand trial. The case proceeded to trial, at which time the following facts were developed.

Guilt Phase

Memphis Police Officer Elenor Worthy was on duty on January 18, 1999. At around 12:20 p.m., Officer Worthy responded to a complaint filed by the victim, Shirley Faulkner. Shirley Faulkner was making a complaint against her husband, Defendant Robert Faulkner. During Officer Worthy's conversation with Shirley Faulkner, Officer Worthy observed that Mrs. Faulkner "was upset. Appeared to be nervous. Her hands were shaking." Officer Worthy also observed that Mrs. Faulkner "had swelling on the left side of her face." Mrs. Faulkner reported that her husband, the Defendant, had struck her with his fist the previous night. During this incident, the Defendant had "held an ashtray over her head and threatened to kill her." Again, on the 18th, the Defendant threatened to kill his wife. Mrs. Faulkner related to Officer Worthy that she suspected that her husband was using cocaine. Three weeks prior to this incident, Mrs. Faulkner had "put her husband out. . . ."

Dr. Freddy Everson, a doctor specializing in family medicine, examined Mrs. Faulkner on January 19, 1999. Dr. Everson concluded that Mrs. Faulkner had "been subjected to some form of trauma to her face." Mrs. Faulkner reported that she had been hit in the face with a fist. Dr. Everson treated Mrs. Faulkner's injury with "non-cirrhodal [sic] anti-flammatory agents or arthritis pills" and instructed her to come back for a follow-up appointment on January 22, 1999. Mrs. Faulkner failed to return for her follow-up visit.

Annie May Brassell, Mrs. Faulkner's supervisor at the Piggly Wiggly on Madison Avenue, testified that Mrs. Faulkner usually worked the 4 to 12 shift. Ms. Brassell related that, on January 21, 1999, Mrs. Faulkner arrived at work around 5:00 p.m. Because business was slow, Ms. Brassell let Mrs. Faulkner leave early, at approximately 11:00 p.m. Before leaving, Mrs. Faulkner purchased some frozen food items and told Ms. Brassell that she was going to the casino. This was the last time Ms. Brassell saw Shirley Faulkner. Ms. Brassell related that Shirley Faulkner had married

Robert Faulkner in September 1998. On cross-examination, Ms. Brassell revealed that she and Shirley Faulkner had been to the casinos together on prior occasions.

Jimmy Lee Blaydes, a security guard at Piggly-Wiggly, testified that on the evening of January 21, 1999, Mrs. Faulkner was at her position as cashier. Shirley Faulkner checked out at 11:15 p.m. and asked Mr. Blaydes to walk her to her car. On the way to her vehicle, Mrs. Faulkner "was kind of excited or shaking real bad from about her shoulders down. . . . . She was kind of, like, maybe crying a little bit." Mr. Blaydes asked her what was wrong. Once reaching her vehicle, Mrs. Faulkner confided to Mr. Blaydes that she was afraid of her husband. Mrs. Faulkner added that she was separated from her husband and she was afraid "he was going to jump on her."

Andre De'Wayne King is married to Shirley Faulkner's daughter, Twyla. Mr. King testified that, in January 1999, he knew Shirley Faulkner to be married to the Defendant, although the two were not living together at the time. Shirley Faulkner resided at 1011 Joseph Place in north Memphis. She had lived there prior to their marriage, during their marriage, and after their separation. Mr. King stated that during the week of January 14, 1999, Shirley Faulkner came to stay with him and his family in their home. Later, Shirley Faulkner later returned to her own home.

On the evening of January 21, 1999, Mr. King recalled that it was raining outside and Shelby County was under a tornado watch. That evening he remained at home with his family, but left the house around midnight to check on his mother-in-law. When Mr. King arrived at Shirley Faulkner's residence, there was no one at home and her vehicle was not in the driveway. He waited in front of the house for about thirty minutes, then left, assuming that Shirley had gone to a friend's home or to the casino.

Twyla King, Shirley Faulkner's daughter, testified that, in January 1999, her mother was working two jobs. During the day, Shirley Faulkner worked for Hilldale Apartments doing housekeeping, and at night she worked at Piggly Wiggly as a cashier. She confirmed that her mother had married the Defendant in September 1998, but by January 1999, the couple had separated. The Defendant had moved in with his grandmother, while Shirley Faulkner remained at the house on Joseph Place.

On January 22, 1999, Mrs. King received a telephone call at approximately 2:00 p.m. from a close family friend, Joe Ann Stewart. Ms. Stewart informed Mrs. King to meet the police at Shirley Faulkner's residence. Two police officers met Mrs. King at the residence. The officers unlocked the front door and went into the house, while Mrs. King and Ms. Stewart remained outside. Sometime that afternoon, Mrs. King learned from a neighbor that her mother was dead.

Joe Ann Stewart had known Shirley McGee Faulkner for thirty years Ms. Stewart had referred Shirley Faulkner to Evonne Churchman for the housekeeping position at the Hilldale Apartments. On January 22, 1999, Ms. Stewart had received a telephone call from Ms. Churchman inquiring as to whether Ms. Stewart had heard from her as she did not report to work that day. In response to Ms. Churchman's telephone call, Ms. Stewart telephoned Twyla King and told her to

meet her at Shirley Faulkner's home. While waiting for Mrs. King to arrive, Ms. Stewart walked to a nearby gas station to telephone the Memphis Police Department. Upon arriving at the service station, Ms. Stewart noticed a patrol unit in the parking lot. She asked the officers to follow her to Mrs. Faulkner's home because she felt that something was wrong. The officer instructed Ms. Stewart to return to Mrs. Faulkner's house and informed her that he would call for help.

Memphis Police Officer Elizabeth Smith testified that, on January 22, 1999, at approximately 3:30 p.m., she arrived at 1011 Joseph Place in North Memphis with her partner Officer Eric Petrowski. The officers were met by Twyla King, who asked the officers to look inside the house and check to see if there were signs of her mother, Shirley Faulkner, being there. The officers failed to discover any signs of forced entry into the home. Officer Petrowski unlocked the door, while Officer Smith asked Mrs. King to remain outside.

Upon entering the residence, Officer Smith observed that a light was on in a library area, and the television was on in the den. As the officers walked down the hallway, Officer Smith noticed groceries on the floor, in the doorway of the kitchen. Officer Smith continued down the hallway toward the bedroom. The bedroom door was closed. In fact, it was the only door closed in the entire house. The officers opened the door, and observed a "white shoe, and the shoe had a foot in it." Officer Petrowski instructed Officer Smith to return to the patrol car to obtain a flashlight. Returning to the house with the flashlight, Officer Smith entered the bedroom and "flashed the light toward the – where the head should be on the body, and really nothing was there." The officers assumed that the person was dead. At this point, the officers exited the home and contacted their supervisor. The area was then secured by the officers.

Memphis Police Sergeant Robin Hulley was assigned to the crime scene unit on January 22, 1999. On this date, Sergeants Hulley and Rewalt responded to a dispatch to 1011 Joseph Place. Upon entering the residence, Sergeant Hulley made the following observation:

> The outside – there – approaching the house, there was no evidence that we could see of any – any problems. You open up into the door; it's a long hallway, something similar to like a boarding house; the rooms are all separate on the sides with – You walk in – from the moment that you walk in, what appeared to be blood was on the floor all the way back to that furthest back bedroom which would be considered –
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> . . .
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> These were drops of blood starting about four to five feet after you enter the front door, all the way back to the master bedroom to the back of the house.

Inside the bedroom, Sergeant Hulley reported that the victim was face up on her back on the bedroom floor. A chest in the bedroom was covered with what appeared to be blood spatter. On the

bed, officers found "[s]ome assorted clothing and what appeared to be the handle of an iron skillet." The officers also discovered what appeared to be drops of blood on the hallway floor.

Officer Mark Rewalt accompanied Sergeant Hulley to 1011 Joseph Place. Officer Rewalt was responsible for measuring and drawing a diagram of the crime scene area along with collecting evidence and tagging it in the property room.

Shelby County Deputy Eddie Gross was on duty on Sunday, January 24, 1999. At approximately 10:00 am, "a male black come [sic] into the office and stated that he wanted to turn hisself [sic] in. And I pulled up in the computer to see what he was wanted for, and I found out that we didn't have anything on him. And so I asked the subject what was his charge, and he stated that, I killed my wife Thursday." The man identified himself as Robert Faulkner. Deputy Gross identified Defendant as the person that made the confession on January 24.

Deputy Gross cuffed Defendant and placed him on the bench, but did not ask any further questions. He then reported the incident to his sergeant and contacted the Memphis Police Department.

Sergeant William Ashton was assigned to investigate the homicide of Shirley Faulkner. During the investigation, Sergeant Ashton discovered that a horseshoe was missing from the house in addition to the missing part of the skillet. Also, the victim's vehicle was missing from the scene. The vehicle was discovered on Saturday, January 23, on Hastings Street, a block south of a residence owned by Defendant's sister. The vehicle had what appeared to be blood on the interior and was later towed to the crime scene office. Sergeant Ashton learned that Defendant was residing with his grandmother at 2328 Shasta Street.

On the morning of Sunday, January 24, Sergeant Ashton received a telephone call from the Shelby County Sheriff's Department Fugitive Bureau, reporting that Defendant was in the fugitive office. Sergeant Ashton then escorted Defendant to the homicide office. Defendant was presented a form containing the *Miranda* rights and was asked to read the form aloud and explain them to Sergeant Ashton. Defendant complied and then dated and signed the form. During this time period, Sergeant Ashton described the Defendant's demeanor as "very calm and very rational." Sergeant Ashton then conducted an oral interview with Defendant.

Sergeant Ashton began his interview by asking Defendant whether he ever used an alias. The Defendant responded, "Yes, Skillet. Defendant added, with a grin on his face, "That's what I hit her with, too." The following written statement, in part, was then taken from Defendant, after again advising him of his rights:

> Question: Do you understand each of these rights I've explained to you?
> Answer: Yes. [the initials "R.F." are beside the yes].
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> . . .

Question: On Friday, January the 22nd, 1999, at approximately 3:03 P.M., the body of Shirley Ann McGhee-Faulkner was found in the residence located at 1011 Joseph Place. Ms. McGhee-Faulkner had been fatally beaten about the head and face. Are you the party responsible for these injuries and the subsequent death of Ms. McGhee-Faulkner?
Answer: Yes.

Question: What type of relationship did you share with Ms. McGhee-Faulkner?
Answer: She was my wife.

Question: How long had you been married?
Answer: Four months.

Question: Did you share the residence at 1011 Joseph Place with her?
Answer: No, we was separated and I was living at 2328 Shasta with my grandmother.

Question: Was there anyone else living at the residence with Ms. McGhee-Faulkner at the time of her death?
Answer: No, for the simple reason her 14 year old son, Jamil, had just received a sentence from Juvenile Court for approximately six months to a year for car theft, and her oldest son, Mushunda, was living on a college campus outside of Nashville–Austin Peay College.

Question: You have indicated that you are responsible for the fatal injuries. When did the incident actually occur?
Answer: Yes, I indicated that I was responsible for the fatal injuries, and the incident occurred around, maybe 12:00 or 12:30 Thursday night or Friday morning.

Question: What was used to inflict the injuries?
Answer: A frying pan and a metal horseshoe.

Question: Where did you get these items from?
Answer: Right next to the bedroom in the little hallway next to the bathroom.

Question: Where in the house did the incident take place?
Answer: The last bedroom at the back of the house which was her bedroom.

Question: How is it that the items that you used were in the hallway and the attack took place in the bedroom?
Answer: Well, before we separated, the horseshoe – horseshoes were always there in the hallway. I have no idea how the pan was in the hallway on the black stove. So as we were finishing our conversation that was turning into an argument, I proceeded to walk from her bedroom to the front door as I was leaving. She walked

behind me and asked me not to come back while I was standing in the hallway and everything exploded. And I pushed her back off me and grabbed the two items that I seen, and I struck her repeatedly across the head.

Question: Do you recall how many blows were struck?
Answer: Somewhere between seven and eight blows. I wasn't counting and I can't recall.

Question: At what point was the victim knocked to the floor?
Answer: Maybe the second blow, and I hit her the other times while she was on the floor.

Question: What did you do after the attack?
Answer: After the attack, I became afraid and scared, and I took the car keys that was in the hallway in the table, got two bags out of the kitchen cabinet and placed the weapons in the bags. Then proceeded to get in her car and drove to Springdale and Hunter and disposed of the weapons in the viaduct that was over flooded because of the rain. I proceeded to go to my house at 2328 Shasta and removed my clothing I had on that was stained with blood, also putting them in a bag I had got out of the house and proceeded to go back towards Springdale and Hunter and threw those in the viaduct along with everything else.

Question: When did you dispose of the car?
Answer: It took approximately twenty minutes to get back off of Jackson to Hastings, and I parked the car on Hastings by some apartments.

Question: Did you know anyone living in the apartments?
Answer: No.

Question: Where did you go after leaving the car?
Answer: I began to sleep in empty houses until I turned myself in.

. . .

Question: Why did you go to the Joseph Place address on Thursday?
Answer: I got a call from my wife at about 12:30 – it was lunch hour – to come by the house once she got off.

Question: Once you arrived at the residence, what was the nature of your conversation with your wife?
Answer: My conversation with my wife was reconciling, and she had on her mind divorce. She said she just wanted the divorce, and I asked her why didn't she just call me on the phone and tell me that. I said, you didn't have to make me walk all

the way from Shasta Street in the rain just to tell me you wanted a divorce. I sat back down on the bed and explained to her that I had enough problems already over my head and had to bury my brother on Monday. Everything I've tried to do since being out has just collapsed. I've lost my job, I've lost my wife, I was subject to being sent back to the penitentiary because I can't be without a job for 30 days. And you called me back here to discuss a divorce, and I only came to reconcile and ask we set aside our differences and go to my brother's funeral together. And she responded she was going, but she wasn't going with me.

Question: When we found the car, there were no keys in it. Do you recall what you did with the keys?
Answer: I can remember somewhere on Leath and Looney in an alley; I throwed [sic] the keys in there at the corner of Leath and Looney by a vacant house.

. . .

Question: Have you and your wife been involved in any altercations since your separation?
Answer: Yes. On the night of January 17th, my wife came to my residence and an altercation erupted, and she thought that she had stuck me with a knife. I only was trying to get her to leave the house by saying to her that she had stuck me with the knife. She proceeded then to leave, went home, called the ambulance and police. It was between 10:00, 11:00 and 12:00, she called me and told me she had sent the police and the ambulance, and I left the house, and I wasn't there when they came.

Question: Did she receive any injuries during this altercation?
Answer: Yes. As she went to get the knife from the kitchen, I slapped her in the eye to try to stop her from getting to the knife.

Question: Is there anything else that you would care to add to your statement that we have not covered in our questioning?
Answer: Yes. For the record, I would like to say, I loved my wife with all my heart. I never meant to take her life. Everything that I had ever tried to do right turned out wrong. Under all the pressure, stress and strain, I made a wrong decision. I only like to say that I'm sorry.

After providing the written statement, Defendant was booked and processed. Defendant requested that jail personnel place him on suicide watch. Although law enforcement officers later searched the viaduct for the frying pan and the horseshoe, their efforts were unsuccessful.

On January 22, 1999, Dr. O'Brian Cleary Smith, the Shelby County medical examiner, and his staff were requested by the Memphis Police Department to report to the crime scene at 1011 Joseph Place. At the scene,

> we did an overall scene evaluation to find out where the victim was located and then looked at everything. First, at the victim from the – where she was positioned, how her clothing was arranged, any stains or marks on her clothing. And then we expanded from there to include the room and then the house. So that she was found in a back bedroom and we did the examination with the body in place of what things we thought were significant findings whether it was projected blood-stain patterns as well as any evidence material that was present in the bedroom.
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> Additionally, we then went through the rest of the house trying to find anything which could be related back to the injury pattern that was seen on the victim, as well as looking for other evidence of blood throughout the house.

Later that day, the body of Shirley McGhee Faulkner was received by the forensic center on Madison Avenue at which time normal procedures for autopsies ensued. Dr. Smith testified:

> The observational phase was significant for the fact that Ms. McGee's trauma was entirely focused about the head. She had numerous bruises and tears to the skin known as lacerations about the face and the head that had produced injuries to the bony structures of the face and the jawbone causing fractures of the facial bones, fractures of the jaw. Some of those injuries had distinct patterns, others did not.
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> The surgical phase. . .showed the injuries had focused in the head region producing bruising of the brain and some of the bone fragments had actually cut into the base of the brain from their dislodgment from the face. Those injuries would have been sufficient to have caused her death. Additionally, it was found that she had taken some of the blood from the injuries down her windpipe into her lungs. And in an effort to breathe this had generated a red frothy foam which obstructed her airway. Also, we found over a . . . pint of blood in her stomach where she had swallowed the blood prior to death.
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> . . .
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> It indicates active swallowing. That much blood certainly can't just leak back down into the stomach.

In other words, the victim had to have been alive to swallow that amount of blood. It was surmised that it would take approximately 36 or 37 times to swallow that much blood.

Dr. Smith continued:

> In detail, the injuries centered about the head were about 13 in minimum number. She received a blow which tore the scalp. A laceration is a tearing or splitting or

> crushing of the skin, where the skin is opened up. But she received a blow to her right brow that lacerated or tore the skin. She received another blow to the glabella, which is the flat part of the forehead in-between the eyes at the top of the nose.
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> . . .
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> Also, she received another blow, a patterned blow. It had two edges to it on the outside of her right eye, a V-shaped tearing of the skin under the right eye; another sort of V-shaped tearing of the skin on her right cheek; two blows to the jaw and lip area and nose area that produced tears and patterned injuries that had a distinct shape of parallel lines about 3/10ths an inch apart on the lips fracturing her dentures and fracturing the jaw, not at the point of the jaw but over here at the hinge point. There's another blow with some abrasions or fine scratches to the upper eyelid and a bruise on the left brow and then there were two bruises deep to the surface of the skin up against the skull on the left side of the head above the ear and one blow to the left back of the head.

Because of the nature of the injuries, Dr. Smith was not able to determine which particular blow was fatal. However, he was able to conclude that the blows to Mrs. Faulkner's head occurred while she was low to the ground and that Mrs. Faulkner made no attempt to move away from the attacker. Dr. Smith further stated that Mrs. Faulkner's blood tested negative for both drugs and alcohol. He concluded that "[t]he cause of death is blunt trauma to the head and the manner is homicide."

In his defense, Defendant presented the following proof. Robert Earl Faulkner, no relation to the Defendant, testified that in 1998 he was employed at Wesley's Auto Service, which at that time was close to the Kroger's warehouse. He could not recall another "Robert Faulkner" working at the Kroger's warehouse during that time period, although he remembered that Jimmy Blaydes had worked there as a security guard. Indeed, Robert Earl Faulkner testified that he has never seen the Defendant Robert Faulkner.

Carl B. McGhee, the vice-president and manager of human resources at Empire Chemical Supply Company, verified that Defendant was employed part-time by the company on March 28, 1998, and was terminated on October 28. Mr. McGhee described the Defendant's job duties as that of "a floor technician and, basically, all he did was just empty trash in the hallways and mop and dust mop and mop the floors and buff them." Jane Cashion, an employee at Remedy Staffing, testified that the Defendant was employed by the company on August 4, 1998, and worked for the company until January 3, 1999.

Sherrie Osby testified that her husband, Jimmy, committed suicide on January 21, 1999. She stated that her husband and Defendant were very close, like brothers.

Joel Bramlitt, chief of operations at Wagonhut Security, testified that Jimmy Blaydes was employed as an armed guard working at Piggly Wiggly grocery stores in 1999. Mr. Bramlitt stated that Mr. Blaydes was terminated from employment because he was carrying a personal weapon, which was against company policy. He affirmed that Mr. Blaydes was not terminated for "not doing his job," or for "stealing, or anything like that. . . ."

Claude E. Hodges, an employee of the Shelby County Sheriff's Department, testified that Defendant was placed in the custody of the Shelby County Jail on January 24, 1999. Defendant was immediately placed on suicidal precaution.

After closing arguments, the jury retired to deliberate on the question of guilt or innocence and returned with a verdict finding Defendant guilty of the premeditated murder of his wife, Shirley Faulkner.

Penalty Phase

Paulette Sutton, a forensic scientist with the Shelby County Medical Examiner's Office, testified that, on January 22, 1999, she and other members from the Medical Examiner's Office were called to a residence located at 1011 Joseph Place. Ms. Sutton explained that, at the scene:

> My job is basically the blood stains or any body fluid stains. First, to do as much analyses as possible in the field and then secondly to look at the stain characteristics. We're looking at the size of a blood stain to tell us what type of activity caused that stain to be created and then looking at the shape of the stain to allow us – to tell us where the stain came from. In other words, if the stains are all going in one direction, we can back track from that and locate the source of the blood or the victim by doing that.
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> So my job is to first do whatever field analyses I can do on stains we think might or might not be blood stains but can't visually determine for sure and then look at these other characteristics of the blood stains and give as much interpretation as possible as to how the stains were created, what type of activity is going on, various observations in the blood-stain pattern analyses.

As a result of her investigation of the crime scene, Ms. Sutton made the following conclusions. The blood stains found on the top of the dresser were the only blood stains found in the bedroom that were higher than three feet above the floor. This fact leads to the conclusion that "the victim was down very quickly after the assault started because of the absence of blood stains being distributed on any other high surfaces." This fact is also confirmed by the shape of the blood spatters and the fact that there was no blood found on the bottom of the victim's shoes. Next, the size of the blood stains indicate that the impact of the originating blows were of "medium velocity impact," or "moving at about 25 feet per second."

Ms. Sutton further explained that in order to cause blood spatter there must be an initial blow "to get the victim bloody," and then subsequent blows must be struck in order for blood to spatter away from the victim. Moreover, the blood spatter at the scene at Joseph Place indicated that the victim went down quickly and did not get back up. Blood spatter found on the walls were determined to be "cast off," because "they are being created by blood coming from a weapon as it is being swung." Additionally, Ms. Sutton discovered the presence of "clotted blood" in front of the dresser. Ms. Sutton explained that the normal clotting time is six minutes. She additionally explained that "blood clots . . . don't jump off of people's bodies and fly around and hit walls and floors and fronts of dressers; that they have to be knocked out by some force." In the present case, "the clots are intermixed with the medium velocity spatter that's on her clothing and on the floor and on the dresser. What that tells me . . . is that the . . . minimum amount of time that the assault had to have continued is six minutes because of clots being spattered around now and not just blood."

Ms. Sutton also found "expirated blood," blood pulled into a person's mouth, nose and lungs and then expelled. The presence of "expirated blood" reveals that the victim "has to be breathing. That's the only way that the blood could get mixed with air and the only way it could get blown back out. . . ." Additionally, Ms. Sutton discovered a trail of blood leading from the bedroom down the hallway. From the spatter, Ms. Sutton could determine that the source of the blood was not traveling at any high rate of speed. Eventually, the blood spatter disappeared for about ten and one-half feet. On the sacks of groceries, located on the floor near the kitchen, Ms. Sutton discovered transfer bloodstains. Transfer stains are those that are created by a bloody object touching a non-bloody object and transferring blood to it. On the front door, Ms. Sutton discovered a transfer fingerprint on the doorknob.

Later, Ms. Sutton went to the crime scene building to examine the interior of the victim's vehicle. Ms. Sutton collected blood stains on the driver's seat. These were transfer stains. The parties stipulated that the blood taken from the car mat is the blood of Shirley Faulkner, the blood taken from the car seat is consistent with a mixture of two or more individuals to which Defendant is not excluded, and genetic material taken from the car seat belongs to Defendant.

Kim Lenahan testified that she is employed by the Criminal Court Clerk's Office of Shelby County, Tennessee. Ms. Lenahan reported that Defendant had been charged under indictment 84-02169 with the offense of second degree murder, and he had indictments in cases numbered 84-01205, 84-01206, 84-1207, 84-1208, 51322, and 47970. The Clerk's records further indicated that Defendant had been convicted in case 84-02169 of second degree murder on October 1, 1984. In cases 84-01205, 84-01206, 84-01207 and 84-01208, the record reflects that Defendant was convicted of robbery in each case on September 17, 1984. Ms. Lenahan testified that indictment 51322 reveals a conviction of assault with intent to commit murder in the first degree, indictment 51323 reveals a conviction of assault with intent to commit robbery, and indictment 47970 reveals a conviction for assault to commit voluntary manslaughter. These convictions occurred in March 1976.

Twyla King, the victim's daughter, testified that she has two brothers, Musenda Spencer, age 21, and Jamil Spencer, age 17. Mrs. King further stated that she has three daughters, ages 11, 6, and 2. Musenda, a college student, has suffered financially since his mother's death as she assisted with his college expenses. She stated that she and her children visited her mother frequently at the Joseph Place residence. After her mother's death, the house was not paid for and had to be relinquished to the mortgage company. This forced the relocation of her brothers who were still living at home with their mother. Mrs. King initially received custody of Jamil, although he is now living with his father. Musenda stays with his sister during breaks and holidays.

Mrs. King explained the effect of their mother's death on herself and her brothers. To Mrs. King, her mother was both a mother and father. Likewise, her brothers' father abandoned them while they were very young, so they too had only their mother. After their mother's death, the children had no means of support. Jamil was incarcerated at the time of his mother's death and there was concern as to where he would go when he was released. His biological father did not want him. Eventually, Jamil was released to the custody of his sister but he continued to have problems and get in trouble. Mrs. King testified that the additional burden of caring for her younger brothers was a financial strain on her own household. When Jamil first moved in with his sister and her family, he had to sleep on the couch because there was no bed for him.

Mrs. King stated that her oldest child, Sarenina, had an especially close relationship with her grandmother, Shirley Faulkner. Sarenina, the only grandchild for six years, often states that she misses her grandmother, cries often, and has been going to counseling to help her deal with the loss of her grandmother.

The defense presented the testimony of Dr. Fred A. Steinberg, a forensic and clinical psychologist. Dr. Steinberg was appointed to examine Defendant. He first received data on Defendant on November 4, 2000, and later examined him. Dr. Steinberg examined Defendant through an interview and the conducting of a battery of psychological tests The first test, the Wechsler Adult Intelligence Scale, is a test of intelligence, which reveals one's cognitive functioning, or the capacity of intellectual level. The second test, the Wide Range Achievement test, is given to see the relative level of a person's reading, spelling and mathematical achievement. The next test, the Booklet Category Test, assesses an individual's ability for reasoning and abstract concept formation, while the Nebraska Screening Test is a neuropsychological screening test which indicates abnormality. The Minnesota Multi-Phasic Personality Inventory (MMPI) provides an assessment of an individual's emotional state and psychological functioning. The inkblot test, Rorschach Inkblot Technique, is used as a personality test in conjunction with the MMPI. The S.I.R.S., the structured interview of reported symptoms, is a good measure that is used to assess whether individuals are feigning responses. The Dusky Standard is a very structured interview which allows for the assessment of an individual's competency to stand trial. Finally, Dr. Steinberg used both the Wechsler memory scale and the Rays memory test, used to assess whether there was any memory impairment.

Dr. Steinberg interviewed Defendant for approximately twelve hours, which included testing. Dr. Steinberg determined that the Defendant "was not malingering on these tests. He was not feigning any illness or condition." Furthermore, as a result of his evaluation, Dr. Steinberg learned that, as a child, Defendant was subjected to quite a great deal of neglect and abuse. Defendant's parents were alcoholics and one was "on drugs." Moreover, during his childhood, Defendant was placed in foster home situations. As an adult, the Defendant developed into a chronic drug user, specifically, crack cocaine, marijuana, and alcohol.

Regarding Defendant's psychological condition on January 21-22, 1999, Dr. Steinberg opined that Defendant "had a predisposition toward impulsive behavior that was really made significantly worse by a number of stressors that he was experiencing." "A stressor is a life change that impacts an individual and has an affect upon his psychological and physiological condition." The stressors impacting the Defendant's behavior included (1) experiencing the life stress of trying to establish himself outside of a prison situation; (2) experiencing marital difficulties; (3) experiencing the loss of a job; (4) experiencing the hospitalization of his grandmother due to Alzheimer's disease; (5) experiencing the suicide of his close friend; and (6) experiencing the frequent use of cocaine. Based upon these factors, Dr. Steinberg stated that he did not "believe [Defendant] was capable of acting like the reasonable person under these circumstances." Dr. Steinberg further explained that:

> [Defendant's] already impulsive personality style was severely compromised by the severity, the number of these stressors that he was experiencing. If you can imagine him being like an individual who became impulsive and lacked the ability to suppress the impulses he was feeling at the time. That's what was happening with him, in my opinion.

He continued:

> The data I have in my psychological testing of him in this – in this evaluation indicated him to basically be a man who is prone to impulsive behavior. He has these character traits. Under the circumstances of the stress and the intoxication of the cocaine, his ability to suppress these impulses was greatly compromised.

In defining impulsive behavior, Dr. Steinberg stated "under states of emotion he is prone to basically act before he thinks." Dr. Steinberg concluded that Defendant's reaction on January 21-22, 1999, was consistent with his behavior. That is, "it appears as though [Defendant] once emotionally charged is quite capable under these circumstances of flying into a rage.

Dr. Steinberg related additional findings that Defendant did not fit "anti-social personality disorder, *per se*," Defendant has mixed personality features, and Defendant is prone to feel remorseful and guilty following his episodic acting out kinds of behavior. He added that:

> In my opinion, Mr. Faulkner had the ability to form intent. However, once his emotions were aroused under stressful circumstances, he did not have the ability to suppress his emotions or emotional behavior. So in that sense, his capacity was diminished to really cap his behavior.
>
> . . .
>
> Well, diminished capacity is typically a situation used in mitigation, like right here, where an individual lacked the ability to form intent. And in a strict sense, I didn't feel like he lacked that ability. In other words, did he have the inability to – did he intend to do it, you know. And I think that in a – he had that intent, he just didn't have that ability to stop himself once he got started.

On cross-examination, Dr. Steinberg admitted that Defendant does not have a mental disease nor does he have a mental defect. Moreover, Defendant is completely sane and competent to stand trial. Dr. Steinberg also conceded that on January 13, 1999, approximately eight days prior to the murder, Defendant passed his drug screen from Redwood Drug Detection Specialist, specifically that no amphetamines, alcohol, marijuana, THC, opiates, cocaine, or barbiturates were detected.

Patricia McNealy, executive director/forensic counselor at the Alcohol and Chemical Abuse Rehab Center, testified that Defendant was sent to the Center as a patient in November 1998, because he had a positive drug screen for cocaine while he was on state parole. On the first day that Defendant arrived at the Center, he admitted to using cocaine the previous day. Ms. McNealy opined that his drug use was apparent that day as "he was shaky." Defendant was scheduled to come twice a week staring on November 18, 1998.

Ms. McNealy related that, behaviorally, cocaine use causes people to have the inability to think, to concentrate, and they become paranoid. During the time period that Defendant was coming to the Center, he was employed at the Cook Convention Center. Defendant was excited about his job, and he felt good about the job and the money he was making. Then Defendant lost his job and he again began using cocaine. Defendant also began having marital problems and problems with his wife's son.

On January 13, 1999, Defendant had been to the Center. Prior to the next meeting on the 20th, Defendant called Ms. McNealy and told her that his brother had committed suicide. On the 20th, the Defendant telephoned Ms. McNealy to inform her that he would not be at that evening's meeting. During the telephone conversation, Defendant admitted that he was using cocaine.

At the close of the proof, the jury was instructed on the following statutory aggravating circumstances:

> (1) The defendant was previously convicted of one (1) or more felonies, other than the present charge, the statutory elements of which involve the use of violence to

> the person. The State is relying upon the crime(s) of murder second degree, robbery, assault to commit murder in the first degree, assault with intent to commit robbery, and assault to commit voluntary manslaughter which are felonies, the statutory elements of which involve the use of violence to the person.
>
> (2) The murder was especially heinous, atrocious, or cruel in that it involved torture.

See generally Tenn. Code Ann. § 39-13-204(i)(2), (5).

The jury was also instructed that it should consider:

> any mitigating circumstances supported by the proof, which shall include, but are not limited to, the following: One, the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. Two, that the defendant had been employed in an effort to rehabilitate himself. Three, that the defendant was enrolled in a drug treatment program. Four, that the capacity of the defendant to control his anger was impaired by the use of cocaine. Five, any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing; that is, you shall consider any aspect of the defendant's character or record, or any aspect of the circumstances of the offense favorable to the defendant which is supported by the evidence.

Following submission of the instructions, the jury retired to consider the verdict. After deliberations, the jury found that the State had proven the aggravating circumstances (i)(2), the defendant was previously convicted of one or more violent felonies other than the present charge. The jury further found that the aggravating circumstance outweighed any mitigating circumstances beyond a reasonable doubt. In accordance with their verdicts, the jury sentenced Defendant to death for the murder of Shirley Faulkner.

I. Evidence of Diminished Capacity

Defendant contends that the trial court improperly excluded testimony regarding Defendant's diminished capacity. Specifically, Defendant asserts that "with the expert testimony of the Defendant's diminished capacity, combined with the Defendant's account of how the homicide came about, the defense would have been able to put on a compelling case for the very real possibility that the Defendant's actions were the result of an explosive, uncontrollable rage, and that this negated any premeditation on his part." We note that, although providing this Court with a short essay on the law applicable to diminished capacity, Defendant has failed to cite to the testimony that was excluded by the trial court. In this regard, the State correctly argues that Defendant has waived this

issue for failure to cite where this evidence can be found in the record and where the trial court's ruling can be found in the record. *See* Tenn. R. App. P 27(a)(7) and (g); Tenn. R. Ct. Crim. App. 10(b). Defendant has responded in his reply brief acknowledging the failure to cite to the record, but adopting the State's citation as his own.

A review of the record and the State's brief reveals that Defendant is challenging the trial court's ruling preventing Defendant from introducing the testimony of Patricia McNealy, a board certified drug counselor, and Dr. Fred Steinberg, a forensic psychologist, during the guilt phase of this capital trial. Patricia McNealy was to testify regarding Defendant's drug dependency and "how upset [Defendant] was." Dr. Steinberg was to testify as to the multiple stressors present in Defendant's life that would have, in conjunction with his drug problem, affected his predisposed tendency to have a short-temper. During a jury-out hearing, the trial court extensively warned defense counsel that, absent proof of a mental disease or defect, this testimony would not be admissible at the guilt phase of the trial under State v. Hall, 958 S.W.2d 679 (Tenn. 1997), *cert. denied*, 524 U.S. 941, 118 S. Ct. 2348 (1998). At the jury out hearing, Dr. Steinberg concluded, "I found no indication of mental disease or defect, as I understand those terms, on those dates." When questioned further by defense counsel, Dr. Steinberg explained,

> Disease is a process of – an illness process, whereas a defect is more of a – something like mental retardation, something as brain damage, neurological dysfunction, epilepsy, something of that nature. And my understanding is that these are — these don't include mental states.

The following colloquy then occurred between the trial judge and Dr. Steinberg:

THE COURT:	Well, let me say this. The case says that he has to be able to testify – and let me just ask you this, Doctor, can you tell the jury under oath that the defendant was inable or unable to form premeditation or intent or knowledge because of a mental disease or defect?
THE WITNESS:	Because of a mental disease or defect?
THE COURT:	Yes, sir.
THE WITNESS:	It's not because of a mental disease or defect.
THE COURT:	Okay. Now, could you tell the jury that he couldn't form a requisite mental state or a culpable mental state because of an emotional state or mental condition? Could you do that?
THE WITNESS:	I'm sorry. Can you repeat that?

THE COURT: Could you tell the jury that you don't think he was able to form a particular premeditation or intent because of an emotional state or a mental condition that he had that day? Could you do that?

THE WITNESS: Because of a —

THE COURT: An emotional state or mental condition, yes, sir.

THE WITNESS: I would – I would agree with that statement.

THE COURT: Okay. And that's our difference here is that the Supreme Court says I can't allow testimony on a particular emotional state or mental condition, but I can if it's a product of a mental disease or defect. And it's just clear in the Supreme Court ruling. And I looked at every case using the word Hall, published and unpublished until today, and I can't find where that case has been reversed. I just can't. And so unless you have any other —

Dr. Steinberg, in response to a question by defense counsel, added that the Defendant was "capable of forming intent, however, he was impaired in his ability to suppress his emotional – emotionality." The trial court then stated:

> But I'm finding that the doctor just testified that he was capable of intent. And for that reason I cannot allow this kind of diminished capacity testimony in the guilt phase because I find that the defense has not shown that the defendant's inability to form the requisite culpable mental state was the produce of a mental disease or defect, only that it was the product of a particular emotional state or mental condition. Okay. And because of that, I don't think I can let your drug and alcohol person testify in the guilt phase unless there is something else she's going with an eye to add to that – to that testimony about that, although she's welcome to testify, of course, in mitigation. If we had a second phase all of that would come in; I wouldn't restrict you all at all in that.

In response to this ruling, defense counsel commented:

> Yes, sir. You know, just before we finish right there, I'd also – there is some that's been diluted down – I think Hall has – speaks of substance abuse whether it be drug or alcohol as to causing a person to have a diminished capacity.

The following colloquy then occurred between defense counsel and the trial court:

THE COURT: We're not going to use those words, now, Mr. Lenow. You need to have a mental condition to where it's hard for them to form a culpable mental state.

MR. LENOW: No, they – okay. Well, they use the word diminished capacity.

THE COURT: I understand that, but . . . But unless the drug abuse – unless someone can testify that he was on drugs, and it negated the intent – for instance, if we had the defendant take the stand and say I was so high at the time, I didn't realize when I broke into that man's house, I thought it was my house. Or someone saying I was so drunk, I couldn't intend to rob anyone. Then, of course, I would allow that in because it negates the specific intent of the crime. If you had anyone today who were testifying that he was so high on cocaine or so drunk that he couldn't form the intent, I would allow the testimony.

MR. LENOW: Yes, sir. And I don't mean to be critical, but –

THE COURT: No, no, that's all right. You can make your record. . . .

MR. LENOW: I think Your Honor is like a lot of judges and a lot of people. We have these words, and there's an A.L.R. on it that says too many of our judges don't understand –

. . .

MR. LENOW: . . . And they spoke of the fact that there's – that they get confused in their minds as to what insanity is and what diminished capacity. That they're two different things. That diminished capacity is something less than what insanity is. Now, the scenario of facts you had just given us would be one that would possibly give a person the defense of temporary insanity which would be different from what diminished capacity is, as such.

THE COURT: No, sir. Insanity does not involve intoxication; it involves mental diseases and defects. There is a difference between the diseases of – the non-defense as Hall calls it of – non- - the non-defense of intoxication. Anything that would keep him from forming the requisite culpable mental state I would allow. And I understand your point of view. All I'm doing is

> this. In State versus Hall they went – they analyzed this issue for pages and they laid it out, and I'm following what they say, And if he is convicted, you're more than welcome to take this up, and I'll watch what the Appellate Courts do with interest. But State versus Hall, in my mind, is exactly on point, word for word. And I'm just following our Appellate Courts. And it doesn't – motion for a new trial, if there is one, you can just have at it, Mr. Lenow; it doesn't hurt my feelings. Okay.

In Tennessee, the doctrine commonly referred to as "diminished capacity" was first recognized by this Court in 1994. *See* State v. Phipps, 883 S.W.2d 138,149 (Tenn. Crim. App. 1994). After an exhaustive review of authority from sister states and the federal circuits, this Court held that "evidence, including expert testimony, on an accused's mental state, is admissible in Tennessee to negate the elements of specific intent, including premeditation and deliberation in a first degree murder case." *Id.* The supreme court summarily agreed with Phipps in State v. Abrams, 935 S.W.2d 399, 402 (Tenn.1996). However, the court did not specifically address the doctrine of diminished capacity until State v. Hall, 958 S.W.2d 679 (Tenn. 1997), *cert. denied*, 524 U.S. 941, 118 S. Ct. 2348 (1998). In Hall, the high court reviewed the exclusion of expert testimony which the appellant alleged was relevant to negate the essential elements of premeditation and deliberation. *Id.* at 688-692. Similar to the discussion in Phipps, the Hall court held that evidence of diminished capacity is not admissible to justify or excuse a crime, but instead to prove that a defendant was incapable of forming the requisite mental state, thereby resulting in a conviction of a lesser offense. *See id.* at 692; *see also* State v. Perry, 13 S.W.3d 724, 734 (Tenn. Crim. App.), *perm. to appeal denied*, (Tenn. 1999). The court cautioned against referring to such testimony as proof of "diminished capacity." *Id.* at 690. Instead such evidence should be presented to the trial court to negate the existence of the *mens rea* for the charged offense. *Id.*

The standard of admissibility of "diminished capacity" type evidence was succinctly coined in State v. Hall, 958 S.W.2d at 689.

> [T]o gain admissibility, expert testimony regarding a defendant's incapacity to form the required mental state must satisfy the general relevancy standards as well as the evidentiary rules which specifically govern expert testimony. Assuming that those standards are satisfied, psychiatric evidence that the defendant lacks the capacity, because of mental disease or defect, to form the requisite culpable mental state to commit the offense charged is admissible under Tennessee law.

The testimony "must demonstrate" that the claimed inability to form the culpable mental state was "the product of a mental disease or defect, not just a particular emotional state or mental condition. It is the showing of a lack of capacity to form the requisite culpable mental intent that is central to evaluating the admissibility of expert psychiatric testimony on the issue." *Id.* at 690 (emphasis added). Admissibility, "as with most other evidentiary questions, ... is a matter which largely rests

within the sound discretion of the trial court." *Id.* at 689.

Pursuant to the Hall standard of admissibility, we are of the opinion that the trial court did not abuse its discretion in excluding the testimony of Dr. Steinberg and Patricia McNealy, which the Defendant sought to present. Dr. Steinberg was unable to testify that the Defendant lacked the capacity to premeditate or to act intentionally or knowingly because of a mental disease or defect. The trial court correctly determined that the Defendant's evidence did not meet the relevancy standard set out in Hall. Defendant is not entitled to relief on this issue.

II. Introduction of Photographs of Homicide Victim

Seven color photographs were admitted during the guilt phase of the Defendant's trial and seven color photographs were admitted during the sentencing phase of the Defendant's trial. During the guilt phase, the following photographs were admitted:

1. Exhibit #3: Color photograph of the victim's body lying on the floor near a dresser. Blood is visible on the victim's head and on the carpet beneath the victim's body.
2. Exhibit # 33: Color photograph of the victim's head during the autopsy. Photo depicts the number and position of wounds to the victim's head.
3. Exhibit # 34: Color autopsy photograph revealing close-up of "cleaned-up" wound to victim's head. Wound showed repeated blows but was not accompanied with pooled or running blood.
4. Exhibit #35: Color autopsy photograph of victim's facial features, specifically the nose and mouth region. Photo revealed "a definite gap or dent or cut in the bottom lip."
5. Exhibit # 36: Color autopsy photograph of victim's facial features, specifically the mouth and chin region. Tape measure indicated size of wounds.
6. Exhibit # 37: Color autopsy photograph of victim's facial features, specifically the upper mouth, nose, and left eye region. Photo indicated number of wounds to facial area.
7. Exhibit # 41: Color autopsy photograph of front view of victim's head. Photo depicted severity of facial wounds inflicted upon the victim.

During the penalty phase, the following photographs were admitted:

1. Exhibit # 47: Color photograph of victim's body lying on bedroom floor.
2. Exhibit # 48: Color photograph of close-up of victim's body as found on bedroom floor.
3. Exhibit # 49: Color photograph of victim's body lying on bedroom floor.
4. Exhibit # 50: Color photograph of victim's body lying on bedroom floor. Different angle showing little or no blood spatter on right side of victim's body.
5. Exhibit #56: Color photograph depicting blood stain on carpet.
6. Exhibit # 60: Color photograph of victim's body lying on bedroom floor. Photograph indicated the presence of blood clots on victim's person and on carpet.

7. Exhibit # 61: Color photograph of close-up of victim lying on bedroom floor. Photograph indicated the presence of blood clots or spatter on dresser behind victim's body.

The Defendant complains that the trial court erred in admitting these photographs stating that "[t]he introduction of gruesome photographs of the victim violates the Defendant's rights under the federal and state constitutions, as well as the Tennessee Rules of Evidence." The State responds that "the relevance of these photographs was not substantially outweighed by the danger of unfair prejudice," and, therefore, the trial court did not err by admitting the photographs.

Tennessee courts follow a policy of liberality in the admission of photographs in both civil and criminal cases. *See* State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978) (citations omitted). Accordingly, "the admissibility of photographs lies within the discretion of the trial court" whose ruling "will not be overturned on appeal except upon a clear showing of an abuse of discretion." *Id.*; *see also* State v. Hall, 8 S.W.3d 593, 602 (Tenn. 1999), *cert. denied*, 531 U.S. 837, 121 S. Ct. 98 (2000). Notwithstanding, a photograph must be found relevant to an issue that the jury must decide before it may be admitted into evidence. *See* State v. Vann, 976 S.W.2d 93, 102 (Tenn. 1988), *cert. denied*, 526 U.S. 1071, 119 S. Ct. 1467 (1999); State v. Braden, 867 S.W.2d 750, 758 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993) (citation omitted); *see also* Tenn. R. Evid. 401. Photographs of a corpse are admissible in murder prosecutions if they are relevant to the issues at trial, notwithstanding their gruesome and horrifying character. Additionally, the admissibility of evidence at a capital sentencing hearing is controlled by section 39-13-204(c), Tennessee Code Annotated, which allows the admission of any evidence "the court deems relevant to the punishment . . . regardless of its admissibility under the rules of evidence." *See* Hall, 8 S.W.3d at 601. In essence, section 39-13-204(c) permits introduction of any evidence relevant to sentencing in a capital case, subject only "to a defendant's opportunity to rebut any hearsay statements and to constitutional limitations." *See* Hall, 8 S.W.3d at 601.

Notwithstanding this broad interpretation of admissibility, evidence that is not relevant to prove some part of the prosecution's case should not be admitted solely to inflame the jury and prejudice the defendant. Banks, 564 S.W.2d at 950-51. Additionally, the probative value of the photograph must outweigh any unfair prejudicial effect that it may have upon the trier of fact. Vann, 976 S.W.2d at 103; Braden, 867 S.W.2d at 758; *see also* Tenn. R. Evid. 403. In this respect, we note that photographs of a murder victim are prejudicial by their very nature. However, prejudicial evidence is not *per se* excluded; indeed, if this were true, all evidence of a crime would be excluded at trial. Rather, what is excluded is evidence which is "unfairly prejudicial," in other words, that evidence which has "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." *See* Vann, 976 S.W.2d at 103 (citations omitted).

A. Photographs at Guilt Phase

Exhibit number 3 is a photograph depicting the location of the victim's body in relation to the dresser. The defense objected stating that sketches of the crime scene were available to show the location of the victim's body and that the photograph was too graphic. The trial court found that "the probative value of this photograph is not outweighed by any unfair prejudice. It's not, in my mind, other than showing someone dead who obviously has been beaten around the head, it's not inflammatory." Five other photographs that were more graphic were excluded by the trial court.

Exhibit numbers 33 though 37 and exhibit number 41 are all photographs of the victim taken during the autopsy. At trial, the State asserted that the photographs were necessary to show different aspects of the examination performed by Dr. Smith. The prosecution stated that the photographs were also necessary as evidence of repeated blows, or proof of premeditation, and not that a single blow was struck in anger. Because the photographs of the wounds were taken during the autopsy, the wounds had been "cleaned up" as much as possible. There was no fresh blood and the photographs were basically "scientific" photographs.

The trial court made the following rulings with regard to these photographs:

> This [exhibit # 33] shows a wound. Apparently, her scalp has been shaved on the right top side of her head to show the wound there. Other than having a little blood in her ear, that seemed to pool in the ear, this picture is a cleaned up picture.
>
> . . .
>
> Well, I find that this will help assist the jury. It's very probative as to the position and the repeated wounds, and it's been cleaned up. And there's nothing gross or heinous about it other than the obvious wound that was inflicted. So I'm going to allow number nine [exhibit #33].
>
> Well, for the record, photograph number twelve [exhibit #34] is a scalp shaved showing a wound or, apparently, several wounds. . . . Because it's a close up showing the obvious repeated blows to that area, I'm going to allow this. It's been cleaned up. And although the wound is red, there is no running blood or pooled blood, so I'm going to allow picture 12.
>
> All right. Looking at picture eight [exhibit # 35] in it[]s totality, there's nothing gross or heinous about it. It's much less graphic than number seven. There is a definite gap or dent or cut in the bottom lip that you can see in this picture, you can't in the other one. I don't think there's any additional unfair prejudicial value at all to number eight, so I'm going to allow number eight also.
>
> All right. That is – covers the same material that [exihibit #35] covers. . . . and that's cumulative with [exhibit #35] . . . .

He has a ruler next to it.

. . .

Well, it's —before it was cumulative, but because it has the ruler, I'm going to do this, then . . . we're going to . . . allow this one as well . . . .

Well, this photograph [exhibit # 37] is a close up of the nose and her left eye and the left side of her mouth, and that shows other things that I didn't see in any other pictures. One, it shows a cut to her nose, to the left side of her nose; it shows two to three cuts to the top left of her mouth, and also a definite cut or blow to the left eye. There's a line on the eyelid. Although her eyelid is partially open, and up at the top – I mean, up in the right eye area, you can barely start to see a wound there. There's nothing about this picture in my mind that's inflammatory, and for that reason, it's probative, and I'm going to allow it.

All right. Well, of all 13 pictures, this is the one that is the most unpleasant to look at because it shows her frontal face., it shows the area where her right eye would be as just a big dent in her head. It show a denture – a partial denture – in her mouth. . . . Her face has been cleaned up and there's no blood. There are open wounds, but there's no pools of blood or dripping blood, and it shows repeated – what seems to me numerous, repeated blows to the front of her face. Which, in my mind . . . would be very probative of the fact that she just laid on the ground. Apparently, if someone hits her in the face like this to cause this wound, her body would have moved. Laying on the ground with someone standing over her, hitting her repeatedly with an object or objects, which is extremely probative of premeditation. The main issue in this case . . . is whether or not the defendant could form intent or premeditation, or whether this was just a knowing killing. This is a 3-D picture . . . you can see that not only was she struck repeatedly, but from different angles which would take some time to do - - to do this damage. And I find that it's cleaned up. And other than being unpleasant, because we have a person who has been killed by these wounds, I don't think that it's being introduced as inflammatory. Any unfair prejudice in this picture over a diagram would be slight, and it does not at all, I think, overcome the extreme probative value of it. . . .

While Defendant admitted to the murder of his wife, he claimed that he acted in a state of passion and thus, was not guilty of first-degree premeditated murder. The issue before the jury was whether the killing resulted from a state-of-passion produced by adequate provocation or whether the killing was premeditated. The purpose for introducing photographs into evidence is to assist the trier of fact. As a general rule, the introduction of photographs helps the trier of fact see for itself what is depicted in the photograph. State v. Griffis, 964 S.W.2d 577, 594 (Tenn. Crim. App.), *perm. to appeal denied*, (Tenn. 1997).

In State v. Banks, 564 S.W.2d at 947, our supreme court set forth several factors to be considered by the trial court in determining admissibility of photographs, including their value as evidence, whether they are needed to establish a *prima facie* case and whether, and to what extent, they are "gruesome."

The only seriously contested issue in the case was the degree of homicide. The State relied heavily upon the nature and extent of injuries inflicted upon the victim to establish a *prima facie* case of first degree murder. While repeated blows are not alone sufficient to establish premeditation, *see* State v. Brown, 836 S.W.2d 530, 542 (Tenn. 1992), the photographs were relevant to the critical issue of premeditation and were not inflammatory. The photographs, demonstrating repeated blows to the head of the victim, were relevant to show the element of premeditation in this first degree murder case. There is little dispute that the photographs are unpleasant and gruesome. However, they are highly relevant and probative to show that Defendant used a weapon upon an unarmed victim, the repeated blows upon the victim, and the brutality of the attack. Our supreme court has held that photographs of the victim may be admitted "as evidence of the brutality of the attack and the extent of force used against the victim, from which the jury could infer malice, either express or implied." State v. Goss, 995 S.W.2d 617, 627 (Tenn. Crim. App. 1998) (citing Brown, 836 S.W.2d at 551; *see also* State v. Smith, 868 S.W.2d 561, 576 (Tenn. 1993) (trial court did not abuse its discretion by admitting a photograph of the victim when the trial court stated that the photograph was relevant to show " 'premeditation, malice and intent because of the multiplicity of these wounds and an obvious intent of whoever was inflicting these wounds.' ")). In this case, the State was required to prove that the killing was intentional. *See* Tenn. Code Ann. § 39-13-202(a)(1). The Defendant claims that he acted out of passion. The photographs of the victim demonstrate that the attack was brutal and non-relenting. The primary effect of seeing the photographs is not so much to inflame the viewer as to reveal to the viewer that, whoever inflicted the injuries upon the victim did so deliberately and premeditatively, striking the victim multiple times. The photographs depict a savage beating. Although they are admittedly gruesome, they give a better description of the nature and extent of the wounds than the testimony of the medical examiner. Under the principles expressed in *State v. Banks*, 564 S.W.2d 947 (Tenn.1978), we find that the trial judge did not abuse his discretion in admitting these photographs.

B. Photographs at Penalty Phase

Exhibit numbers 47 through 50 and exhibit numbers 56, 60 and 61 are photographs of the victim's body as it was discovered at the crime scene. Exhibit number 47 depicts the wounds to the victim's head, but also movement of the victim's head from right to left. The trial court found this photograph probative to prove the heinous, atrocious, cruel aggravator. Exhibit 49 is the same photograph as exhibit 47. However, exhibit 49 contains two ink markings referencing blood spatter that exhibit 47 lacks. Exhibits number 48 and 50 were admitted because (1) number 48 was a close-up photograph and (2) number 50 was "far back showing the other side of the body with no blood on it." Exhibit 56 depicts a pool of blood in the carpet. The trial court found this photograph admissible as "it's not gruesome." Exhibits 60 and 61 were admitted to show the duration of the

assault demonstrating the various aspects of blood clotting. The court found that "there's nothing in these photographs the jury would not have already have seen from earlier photographs." On appeal, the Defendant complains that the admission of these photographs was error in that (1) the photographs were more prejudicial than probative and (2) the photographs were cumulative.

Photographs are not necessarily rendered inadmissible because they are cumulative of other evidence or because descriptive words could be used. *See* Collins v. State, 506 S.W.2d 179, 185 (Tenn. Crim. App. 1973). Photographs must be relevant to prove some part of the prosecution's case and must not be admitted solely to inflame the jury and prejudice them against the defendant. Banks, 564 S.W.2d at 951; *see* Tenn. R. Evid. 403 (relevant evidence may be admitted if its probative value is not "substantially outweighed by the danger of unfair prejudice"). On appeal, the trial court's decision to admit a photographic exhibit is reviewable for abuse of discretion. *Banks*, 564 S.W.2d at 949.

Photographs depicting a victim's injuries have been held admissible to establish torture or serious physical abuse under aggravating circumstance (i)(5). *See, e.g.*, State v. Smith, 893 S.W.2d 908, 924 (Tenn.1994) (photographs depicting the victim's body, including one of the slash wound to the throat, which was "undeniably gruesome," were relevant to prove that the killing was "especially heinous, atrocious, or cruel" and were admissible for that purpose); State v. McNish, 727 S.W.2d 490, 494-95 (Tenn .1987) (photographs of the body of the victim who was beaten to death were relevant and admissible to show the heavy, repeated and vicious blows to the victim and to prove that the killing was "especially heinous, atrocious, or cruel"). Although the photographs are not necessarily pleasant to view, the photographs accurately depict the nature and severity of the injuries inflicted upon the victim. This evidence was relevant to the State's proof of the "heinous, atrocious, and cruel" aggravating circumstance. *See, e.g.*, State v. Morris, 24 S.W.3d 788 (Tenn. 2000); State v. Hall, 976 S.W.2d 121, 162 (Tenn. 1998); State v. Smith, 893 S.W.2d 908, 924 (Tenn.1994), *cert. denied*, 516 U.S. 829, 116 S.Ct. 99 (1995); State v. Smith, 868 S.W.2d 561, 579 (Tenn.1993), *cert. denied*, 513 U.S. 960, 115 S.Ct. 417 (1994) (citing State v. Payne, 791 S.W.2d 10, 19- 20 (Tenn.1990), *judgment aff'd. by*, 501 U.S. 808, 111 S.Ct. 2597(1991); State v. Miller, 771 S.W.2d 401, 403-404 (Tenn.1989), *cert. denied*, 497 U.S. 1031, 110 S.Ct. 3292 (1990); State v. Porterfield, 746 S.W.2d 441, 449-450 (Tenn.), *cert. denied*, 486 U.S. 1017, 108 S.Ct. 1756 (1988); McNish, 727 S.W.2d at 494-495. Moreover, given the fact that the jury rejected the (i)(5) aggravator, we are unable to conclude that the photographs prejudiced the jury's verdict.

The photographs are relevant and are not so unfairly prejudicial as to bar their admission. Accordingly, we cannot conclude that the trial court abused its discretion by admitting these photographs. *See* Tenn. R. Evid. 403. Defendant is not entitled to relief on this issue.

III. Failure to Correctly Charge the Jury

Defendant claims that the trial court improperly charged the jury. Precisely, he alleges that the verdict form employed in this matter failed to reflect that the jury found the (i)(2) aggravating

circumstance "beyond a reasonable doubt." Additionally, Defendant cites as error the trial court's failure to define the essential elements of the offenses submitted to the jury. He contends that the trial court failed to properly instruct the jury as to the mental elements of homicide, thus, improperly lessening the State's burden of proof.

Under the United States and Tennessee Constitutions, a defendant has a constitutional right to trial by jury. State v. Garrison, 40 S.W.3d 426, 432 (Tenn. 2000) (citing U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . "); Tenn. Const. Art. I, § 6 ("[T]he right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors.")). In Tennessee, this right dictates that all issues of fact be tried and determined by twelve jurors. Garrison, 40 S.W.3d at 432 (citing State v. Bobo, 814 S.W.2d 353, 356 (Tenn. 1991); Willard v. State, 174 Tenn. 642, 130 S.W.2d 99 (Tenn. 1939)). Thus, it follows that a defendant has a right to a correct and complete charge of the law, so that each issue of fact raised by the evidence will be submitted to the jury on proper instructions. Garrison, 40 S.W.3d at 432 (citing State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990)).

However, the reviewing court must remain mindful that jury instructions given at trial should not be measured against a "standard of perfection." City of Johnson City v. Outdoor West, Inc., 947 S.W.2d 855, 858 (Tenn. App. 1996), perm. to appeal denied, (Tenn. 1997) (citing Grissom v. Metropolitan Gov't of Nashville, 817 S.W.2d 679, 685 (Tenn. App. 1991)). The United States Supreme Court has observed that in evaluating claims of error in jury instructions, courts must remember that "'jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning'" but instead may be presumed to utilize "'commonsense understanding of the instructions[.]'" State v. Vann, 976 S.W.2d 93, 101 (Tenn. 1998), cert. denied, 526 U.S. 1071, 119 S. Ct. 1467 (1999) (quoting Boyde v. California, 494 U.S. 370, 380-381, 110 S. Ct. 1190, 1198 (1990); *see also* State v. Van Tran, 864 S.W.2d 465, 479 (Tenn. 1993)). Therefore, we review each jury charge to determine if it fairly defined the legal issues involved and did not mislead the jury. *See* Hall, 958 S.W.2d at 696; Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439, 446 (Tenn. 1992).

A. Jury Verdict

The Defendant asserts that because the verdict form used by the jury failed to state that the jury found that the State had proven the listed statutory aggravating circumstance beyond a reasonable doubt, his death sentence must be modified to a life sentence. Defendant argues that the defective form, in effect, resulted in the jury's failure to find that the State had proven the (i)(2) aggravator beyond a reasonable doubt. The State asserts that this issue is waived for (1) failure of the Defendant to enter a contemporaneous objection to the verdict and (2) failure to include the issue in his motion for new trial. Although the State's position is well-taken, we elect to review this issue due to the severity of the sentence imposed in this matter. *See, e.g.*, State v. McKinney, 74 S.W.3d 291 (Tenn.), *cert. denied*, – U.S.–, 123 S. Ct. 321 (2002).

The jury verdict in this matter reads as follows:

> We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances: the defendant was previously convicted of one or more felonies other than the present charge. The statutory elements of which involve the use of violence to the person. We, the jury, unanimously find that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance so listed above outweighs any mitigating circumstances. Therefore, we, the jury, unanimously find that the punishment for the defendant, Robert Faulkner, shall be death.

Prior to the jury's verdict, the trial court provided, in relevant part, the following instructions to the jury:

> In arriving at this determination, you are authorized to weigh and consider any of the ***statutory aggravating circumstances proven beyond a reasonable doubt***, and any mitigating circumstances which may have been raised by the evidence throughout the entire course of this trial, including the guilt-finding phase or sentencing phase or both. . . .
>
> ***The burden of proof is upon the state to prove any statutory aggravating circumstance or circumstances beyond a reasonable doubt.***
>
> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of your verdict. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty is not demanded by the law, but moral certainty is required, and this certainty is required as to every element of proof needed to constitute the verdict.
>
> . . .
>
> Victim impact evidence is not the same as an aggravating circumstance. Proof of an adverse impact on the victim's family is not proof of an aggravating circumstance. Introduction of this victim impact evidence in no way relieves the ***State of its burden to prove beyond a reasonable doubt at least one aggravating circumstance which has been alleged.*** You may consider the victim impact evidence in determining the appropriateness of the death penalty only if you first ***find that the existence of one or more aggravating circumstances has been proven beyond a reasonable doubt by evidence independent from the victim impact evidence***, and find that the aggravating circumstance or circumstances found outweigh the finding of one or mote mitigating circumstances beyond a reasonable doubt.

> . . .
>
> Tennessee law provides that no sentence of death or sentence of imprisonment for life without the possibility of parole shall be imposed by a jury but upon a unanimous finding that ***the state has proven beyond a reasonable doubt the existence of one (1) or more statutory aggravating circumstances,*** which shall be limited to the following. . .
>
> . . .
>
> Members of the Jury, the court has read to you the aggravating circumstances which the law requires you to consider ***if you find proved beyond a reasonable doubt.*** . . .
> (Emphasis added)**.** The trial court further instructed:
>
> ***If you unanimously determine that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proven by the state, beyond a reasonable doubt,*** and said circumstance or circumstances have been proven by the state to outweigh any mitigating circumstance or circumstances, beyond a reasonable doubt the sentence shall be death. The jury shall reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found, and signify that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance or circumstances outweigh any mitigating circumstances.
>
> You will write your findings and verdict upon the enclosed form attached hereto and made part of this charge. Your verdict shall be as follows:
>
> > (1) We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances;
> > (2) We, the jury, unanimously find that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance or circumstances so listed above outweigh any mitigating circumstances.
> > (3) Therefore, we, the jury, unanimously find that the punishment shall be death.

(Emphasis added).

Initially, we note that the verdict form submitted to the jury is a verbatim recitation of that provided in section 39-13-204(g), Tennessee Code Annotated. Indeed, section 39-13-204(g)(2)(A)(i), Tennessee Code Annotated, does not require that the jury shall note on the verdict form that the aggravating circumstance(s) were found beyond a reasonable doubt. Rather, the only requirement made is that the jury signify on the verdict form that the State has proven, beyond a

reasonable doubt, that the statutory aggravating circumstance(s) outweigh the mitigating circumstances. Tenn. Code Ann. § 39-13-204(g)(2)(A)(ii). We also recognize that the trial court individually polled the jury as to their verdict. Additionally, the trial court instructed the jury no less than seven times that the State had to prove the existence of the aggravating circumstance/circumstances beyond a reasonable doubt. Reading the jury charge and the verdict form as a whole, the jury could only have understood the burden of proof of "beyond a reasonable doubt" to apply to the determination of whether the State had proven the existence of the aggravating circumstance/circumstances.

The argument in this case is analogous to the claim rejected by this Court in State v. Timothy McKinney, No. W1999-00844-CCA-R3-DD, 2001 WL 298636 (Tenn. Crim. App. at Jackson, Mar. 28, 2001), *aff'd by*, 74 S.W.3d 291 (Tenn. 2002). In McKinney, the defendant argued that the jury's verdict was erroneous and incomplete in part due to the jury's failure to find that the State had proven the statutory aggravating circumstance beyond a reasonable doubt. State v. Timothy McKinney, No. W1999-00844-CCA-R3-DD. As in the present case, the State relied upon the (i)(2) aggravating circumstance to support the imposition of the death penalty. *See id.* As proof of the aggravating circumstance, the State introduced, without objection or rebuttal, evidence of the defendant's 1994 conviction for aggravated robbery. *Id.* This Court determined that the trial court had provided the jury with thorough instructions which clearly delineated the State's burden of proving the statutory aggravating circumstance beyond a reasonable doubt *and* a valid verdict form. *Id.* This Court concluded that the "jury's findings are clearly those allowed by the statute and permit effective appellate review. It is clear that the jury found the existence of the (i)(2) aggravating circumstance beyond a reasonable doubt, and the verdict in this case is adequate." *Id.*

In the present case, the State sought the death penalty based upon the (i)(2) and (i)(5) aggravating circumstances. In support of the (i)(2) aggravating circumstance, the State introduced, without objection or rebuttal, evidence of the Defendant's convictions for second-degree murder, robbery, assault to commit murder in the first degree, assault with intent to commit robbery, and assault to commit voluntary manslaughter. The trial court provided the same or similar instructions and the same verdict form as provided by our legislature. We discern no persuasive reason to sway from this Court's conclusion in McKinney. Defendant is not entitled to relief on this issue.

B. Instruction on "Intentional"

The trial court provided the following instruction, in relevant part, as to the offense of first-degree premeditated murder:

> Any person who commits the offense of first degree murder is guilty of a crime.
>
> For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements: one, that the defendant unlawfully killed the alleged victim; and two, that the defendant

> acted intentionally. A person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it's the person's conscious objective or desire to engage in the conduct or cause the result: And three, that the killing was premeditated.

The trial court then instructed the jury as to the offense of second-degree murder as follows:

> Second Degree Murder: Any person who commits the offense of second degree murder is guilty of a crime.
>
> For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements: one, that the defendant unlawfully killed the alleged victim: and two, that the defendant acted knowingly.
>
> "Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.
>
> The requirement of "knowingly" is also established if it's shown that the defendant acted intentionally.
>
> "Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it's the person's conscious objective or desire to engage in the conduct or cause the result.

Defendant cites as error the trial court's instruction on "intentional" as the necessary culpable mental state for first-degree premeditated murder and in the definition of "knowing" as the necessary culpable mental state for second-degree murder. In support of his argument, the Defendant relies upon this Court's decision in State v. Page, 81 S.W.3d 781 (Tenn. Crim. App. 2002). In Page, the defendant was charged and convicted of second-degree murder. The circumstances of that offense are as follows. The fifteen-year-old defendant was out drinking and riding around with his friends. As they passed the victim, the victim's girlfriend, and her son, the defendant shouted, "Ooh! You're ugly!" Page, 81 S.W.3d at 783. The victim responded by gesturing with his middle finger. *Id.* The defendant and his cohorts turned their vehicle around and drove past the victim; this time, the defendant extended a baseball bat out the window, nearly hitting the victim. *Id.* The defendant and his friends then exited the truck and confronted the victim. *Id.* The victim displayed a knife. *Id.* The defendant retrieved the baseball bat from the truck. *Id.* The defendant pursued the victim, taunting the victim. *Id.* The defendant struck the victim on the head from behind. *Id.* The defendant then fled the scene. Later, the defendant testified that he could not believe that the victim had died. *Id.* At trial, the defendant's counsel argued that the defendant was intoxicated to the

extent that he did not appreciate his conduct and did not think the blow was that severe. Counsel suggested that the offense was criminally negligent homicide. The State, in its response, emphasized the nature of the conduct and the circumstances surrounding the conduct elements in the instruction. The charge provided by the trial court gave credence and confirmation to the State's erroneous contention that the jury could find the defendant guilty based upon "the nature of the conduct" or "the circumstances surrounding the conduct." Based upon this instruction, the jury found the defendant guilty of second-degree murder.

This Court reversed the defendant's conviction because the trial court instructed the jury that a person acts "knowingly" if the person acts with an awareness: (1) that his conduct is of a particular nature; or (2) that a particular circumstance exists; or (3) that the conduct was reasonably certain to cause the result. Page, 81 S.W.3d at 786. Acknowledging our supreme court's designation of second-degree murder as a result of conduct offense, *see* State v. Ducker, 27 S.W.3d 889, 896 (Tenn. 2000), this Court determined that "[t]he result of the conduct is the only conduct element of the offense; the 'nature of the conduct' that causes death is inconsequential." Page, 81 S.W.3d at 787. The jury had the option of convicting the defendant based upon his awareness of the nature of his conduct or upon the circumstances surrounding his conduct, thus, the State's burden of proof was improperly lessened. *See* Page, 81 S.W.3d at 788. This Court explained, "[f]or second degree murder, a defendant must be aware that his or her conduct is reasonably certain to cause death." *Id.* (citing Tenn. Code Ann. § 39-11-302(b); State v. Keith T. Dupree, No. W1999-01019-CCA-R3-CD, 2001 WL 91794, at *4 (Tenn. Crim. App. at Jackson, Jan. 30, 2001), *no appl. for perm. to appeal filed.* (Emphasis added). In dicta, the Court stated that

> [p]remeditated first degree murder requires not only that the killing be "intentional," but also that the defendant act with a "premeditated" mental state. Tenn. Code Ann. § 39-13-202(a)(1) (1997). "Premeditation" is defined by statute. *Id.* at (d). We conclude the "intentional" culpable mental state of premeditated first degree murder relates to the result of the conduct. Accordingly, our suggested jury charge for premeditated first degree murder deviates from T.P.I. – CRIM. 2.08 and 7.01(b) (5th ed. 2000) by deleting the reference to the nature of the defendant's conduct.

Page, 81 S.W.3d at 789, n.2. Because the defendant's *mens rea* was essentially the only disputed issue at trial, this Court found that the error required reversal. *Id.* Defendant argues that this Court's decision in Page requires reversal in the present case as the trial court committed the same error by instructing the jury in the disjunctive on the definition of "intentional" and "knowingly." The State asserts that the Defendant has waived this issue for failing to make a contemporaneous objection at trial and for failing to raise the issue in his motions for new trial. *See* Tenn. R. App. P. 36(a). While the State is correct in its assertion, this Court elects to review the issue on its merits.

This Court has previously considered the holding of Page in the context of a conviction for first-degree premeditated murder in State v. Paul Graham Manning, No. M2002-00547-CCA-R3-CD 2003 WL 354510 (Tenn. Crim. App. at Nashville, Feb. 14, 2003), *perm. to appeal filed,* (Apr. 4,

2003), and State v. Antoinette Hill, No. E2001-02524-CCA-R3-CD, 2001 WL 31780718 (Tenn. Crim. App. at Knoxville, Dec. 13, 2002), *no appl. for perm. to appeal filed.* In both cases, this Court concluded that an instruction as to the "nature of the conduct" relative to first-degree murder is irrelevant. *See* State v. Paul Graham Manning, No. M2002-00547-CCA-R3-CD, 2003 WL 354510, at * 7; State v. Antoinette Hill, No. E2001-02524-CCA-R3-CD, 2002 WL 31780718, at *5. In this regard, this Court held that the irrelevant definition constitutes error as it improperly lessens the State's burden of proof. *Id.* Indeed, in order to be convicted of first-degree premeditated murder, a defendant must be aware that his conduct is reasonably certain to cause death. State v. Paul Graham Manning, No. M2002-00547-CCA-R3-CD, 2003 WL 354510, at *8 (citing Page, 81 S.W.3d at 788). Notwithstanding the error, however, this Court, in both Paul Graham Manning and Antoinette Hill, found the error harmless.

In Paul Graham Manning, the defendant did not concede that he had committed the killing. Rather, he claimed that he could not remember what had happened to his wife or how she came to be shot. State v. Paul Graham Manning, No. M2002-00547-CCA-R3-CD, 2003 WL 354510, at *8. The defendant had attempted to blame his son for his wife's death. *Id.* Because the defendant maintained that he had not been the person who shot his wife, this Court found the error in the instruction was harmless beyond a reasonable doubt. *Id.*

In Antoinette Hill, the defendant, either before the day of the offense or while engaged in the conduct of choking the victim, displayed a previously formed intent to kill. State v. Antoinette Hill, No. E2001-02524-CCA-R3-CD, 2002 WL 31780718, at *5. (citation omitted). The evidence was undisputed that the defendant committed acts that contributed to the death of the victim, helped dispose of the body, and fully cooperated in a coverup of the crime. *Id.* Evidence existed to supply the defendant's motive. *Id.* Thus, this Court found the error in the intentional instruction harmless beyond a reasonable doubt. *Id.* Moreover, this Court observed that the jury had determined that the defendant had a preconceived design to assist in the commission of the murder, thereby resolving the issue of intent to cause death. *Id.*

We also conclude that the error in the jury instruction provided in the instant case to be harmless error. Although the Defendant, as in Page, admitted that he had killed the victim, the record includes substantial evidence for the jury to have concluded that the Defendant intentionally caused the death of the victim. Evidence was introduced demonstrating the Defendant's previously formed intent to kill, *i.e.*, previous threats made to the victim that he would kill her, the numerous blows inflicted upon the victim, and the presence of defensive marks upon the victim. The Defendant also disposed of the murder weapons and bloody clothing in the viaduct after the murder. These facts are distinguishable from those in Page. The evidence in this case sufficiently supported the jury charge as to find result-oriented conduct. Unlike in Page, the jury was provided the opportunity to determine whether Defendant was aware that his conduct was reasonably likely to cause death, *i.e.*, the jury was able to determine that Defendant had a preconceived design to assist in the commission of the murder. Accordingly, any error in this matter regarding the instruction on "intentionally" is harmless.

The Defendant makes the same argument as to the "knowing" element of second-degree murder. Because the Defendant was not convicted of this offense, this issue is moot. *See* State v. Paul Graham Manning, No. M2002-00547-CCA-R3-CD. Therefore, Defendant is not entitled to relief on this issue.

IV. Failure of Indictment to Allege Capital Offense

Defendant asserts that, "pursuant to Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), the indictment against him did not charge a capital offense and that he cannot, therefore, be sentenced to more than life imprisonment." Defendant's argument is based upon the premise that first-degree murder is not a capital offense unless accompanied by aggravating factors. Essentially, Defendant complains that the indictment returned by the grand jury charges non-capital first-degree murder because the grand jury did not find any capital aggravating circumstances. Thus, Defendant alleges that to satisfy the requirements of Apprendi the indictment must include language of the statutory aggravating circumstances to elevate the offense to capital murder. Because of this omission in the indictment, he argues that the State was then precluded from filing a Rule 12.3 notice of intent to seek the death penalty as Rule 12.3, Tennessee Rules of Criminal Procedure, provides that a notice of intent to seek the death penalty may be filed "[w]here a capital offense is charged in the indictment or presentment." Defendant asserts that, since a capital offense was not alleged in the indictment, the State could not then rely upon aggravating factors to enhance his sentence to death.

The State asserts that this issue is waived. First, the State contends that Defendant's failure to file a pre-trial motion to dismiss the indictment in this matter results in waiver of this issue. *See* Tenn. R. Crim. P. 12(b). We agree with the State's conclusion based upon the application of this rule to the facts at hand. Tennessee Rule of Criminal Procedure 12(b) provides, in pertinent part:

> (b) *Pretrial Motions.* Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion.... The following must be raised prior to trial: ... (2) Defenses and objections based on defects in the indictment, presentment or information (*other than that it fails to show jurisdiction in the court or to charge an offense* which objections shall be noticed by the court at any time during the pendency of the proceedings).

Tenn. R. Crim. P. 12(b)(2) (emphasis added). Defendant has claimed that the indictment failed to charge the offense of capital first-degree murder. Defendant's argument fails because there is no question that the trial court had jurisdiction in this first-degree murder case. Furthermore, the indictment clearly charges the offense of first-degree murder. Defendant's argument is based upon the assertion that the facts which justify the statutorily authorized punishment of death must be alleged in the indictment. Alternatively, the State argues that the issue is waived because the Defendant failed to preserve the issue by raising the issue in his motion for new trial. *See* Tenn. R. App. P. 3(d). Moreover, while this Court may employ "plain error" to review errors not properly

raised by an appellant, such error must affect "the substantial rights of an accused" and must be "necessary to do substantial justice." Tenn. R. Crim. P. 52(b). Plain error review is not implicated in this case.

Nevertheless, our supreme court has resolved the question of whether the Apprendi holding is applicable to Tennessee's capital sentencing procedure. In State v. Dellinger, 79 S.W.3d 458, 466-67 (Tenn.), *cert. denied*, –U.S.–, 123 S. Ct. 695 (2002), the court dismissed a similar claim involving the constitutionality of a first-degree murder indictment and held that Apprendi was not applicable to capital cases in Tennessee. *See also* State v. Richard Odom, No. W2000-02301-CCA-R3-DD, 2002 WL 31322532, (Tenn. Crim. App. at Jackson, Oct. 15, 2002). Additionally, this Court has since rejected the argument that the United States Supreme Court decision in Ring v. Arizona has any effect on our supreme court's analysis in State v. Dellinger. *See* State v. Richard Odom, No. W2000-02301-CCA-R3-DD; *cf.* Terrell v. State, 572 S.E.2d 595 (Ga. 2002) (federal constitution does not render unconstitutional the Georgia procedure of listing the statutory aggravators that support a death penalty through means other than the indictment); Porter v. Crosby, No. SC01-2707 (Fla. Jan. 9, 2003) (rejecting claim that Apprendi requires aggravating circumstances to be charged in the indictment); Baker v. State, 790 A.2d 629, 650-51 (Md. 2002) (same), *cert. denied*, 535 U.S. 1050, 122 S. Ct. 475 (2001); Oken v. State, 786 A.2d 691 (Md. 2001) (holding that Apprendi does not invalidate Maryland's capital punishment law), *cert. denied*, 535 U.S. 1074, 122 S. Ct. 1953 (2002); Brown v. Moore, 800 So.2d 223, 225 (Fla. 2001)(rejecting claim that Apprendi requires aggravating circumstances to be charged in the indictment): Mann v. Moore, 794 So.2d 595, 599 (Fla. 2001) (same), *cert. denied*, – U.S.–, 122 S. Ct. 2669 (2002); State v. Holman, 540 S.E.2d 18, 23 (N.C. 2000) (same), *cert. denied*, 534 U.S. 910 122 S. Ct. 250 (2001); State v. Golphin, 533 S.E.2d 168, 193-94 (N.C. 2000)(same), *cert. denied*, 532 U.S. 931, 121 S. Ct. 1379 (2001).

In Ring v. Arizona, the United States Supreme Court applied its earlier holding in Apprendi v. New Jersey, 530 U.S. at 466, 120 S. Ct. at 2348, to death penalty cases and held that "[c]apital defendants . . . are entitled to a jury determination on any fact on which the legislature conditions an increase in their maximum punishment." Ring, 536 U.S. at 584, 122 S. Ct. at 2432. The defendant, in Ring, was convicted of felony murder. Under Arizona law, the maximum sentence he could receive was life imprisonment without the possibility of parole. Arizona does not define any particular types of murder as punishable by death. However, Ring could be sentenced to death if the trial court found the presence of an aggravating circumstance. The trial judge is the sole finder of the existence of any aggravating circumstances that would support a death sentence. Indeed, the trial judge, in Ring, found the existence of an aggravator and sentenced Ring to death. The United States Supreme Court held: "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' Apprendi, 530 U.S. at 494, n. 19, 120 S. Ct. 2348, the Sixth Amendment requires that they be found by a jury." 536 U.S. at 584, 122 S. Ct. At 2443.

Death sentences in Tennessee comply with both Apprendi and Ring as our capital sentencing statute requires the jury, or judge (if the jury is waived), to find the presence of an aggravating circumstance(s) beyond a reasonable doubt and that the applicable aggravator(s) outweighs any mitigating factor(s) beyond a reasonable doubt. *See* Tenn. Code Ann. § 39-13-204(g); Tenn. Code

Ann. § 39-13-205; *see also* Ring v. Arizona, 536 U.S. at 584 , 122 S. Ct. at 2442 n. 6 (the State of Tennessee "commit[s] sentencing decisions to juries"). Moreover, as stated by our supreme court in Dellinger, "]t]he death penalty is within the statutory range of punishment prescribed by the legislature for first degree murder. Tenn. Code Ann. § 39-13-202(c)(1)." Dellinger, 79 S.W.3d at 466-67. The rule of Apprendi and Ring is that defendants are "entitled to a jury determination of any fact on which the legislature conditions an increase in their punishment." Ring, 536 U.S. at 584, 122 S. Ct. at 2432; *accord* Apprendi, 530 U.S. at 483, 120 S. Ct. at 2348. When a defendant is already eligible for the death penalty, no subsequent finding or evaluation of fact can possibly increase his sentence, for the obvious reason that there is no penalty greater than death. The fact that the finding and weighing process regarding mitigating and aggravating factors may differ, under Apprendi and Ring, these possibilities are constitutionally irrelevant because they do not increase the maximum sentence that the defendant may suffer. Defendant is not entitled to relief on this issue.

V. Death Penalty Violates United States Treaties and International Law

Defendant next asserts that Tennessee's imposition of a death penalty violates United States treaties and hence the Constitution's Supremacy Clause. Defendant asserts that the Supremacy Clause was violated when his rights under treaties and customary international law to which the United States is bound were disregarded. Specifically, his argument is based upon two primary grounds: (1) customary international law and specific international treaties prohibit capital punishment, and (2) customary international law and specific international treaties prohibit reinstatement of the death penalty by a governmental unit once it has been abolished. This identical argument has recently been rejected by a panel of this Court in State v. Richard Odom, No. W2000-02301-CCA-R3-DD. We cannot discern any viable reason to resolve this issue in a different manner in the present case.

In a lengthy opinion, Judge Boggs, writing on behalf of the Sixth Circuit Court of Appeals, dismissed similar claims that the Ohio death penalty scheme violated both international laws and treaties. *See* Buell v. Mitchell, 274 F.3d 337 (6th Cir. 2001). As in the present case, the defendant argued that Ohio's death penalty statute violates the Supremacy Clause of the United States Constitution by not complying with (1) the American Declaration of the Rights and Duties of Men and (2) the International Covenant on Civil and Political Rights**.** Additionally, the defendant relied upon statistics indicating that over one hundred nations prohibit executions, a number that defendant claims is far greater than necessary to establish a customary international law norm. *Id.* In essence, the defendant argued that "the prohibition of executions is not only a customary norm of international law, but rather, a peremptory norm of international law, or *jus cogens*, that is accepted and recognized by the international community and that cannot be derogated." *Id.* at 373 (citations omitted).

In finding the defendant's allegations "wholly meritless," the Sixth Circuit recognized that:

> It is a long-standing principle under United States law that 'international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.' *The Paquete Habana*, 175 U.S. 677, 700, 20 S. Ct. 290 (1900). In order to define what is a 'rule of international law,' the Restatement (Third) of Foreign Relations Law instructs us:
>
> > (1) A rule of international law is one that has been accepted as such by the international community of states
> >
> > (a) in the form of customary law;
> >
> > (b) by international agreement; or
> >
> > (c) by derivation from general principles common to the major legal systems of the world.
> >
> > Restatement (Third) of Foreign Relations Law § 102(1) (1987).

Buell v. Mitchell, 274 F.3d at 370-71. Judge Boggs then addressed the defendant's contentions that "the abolition of the death penalty has been accepted by international agreement and as a form of customary law." *Id.* at 371.

The defendant asserted that "the Ohio death penalty violates international agreements entered into by the United States. . . ." *Id.* at 370. The Sixth Circuit rejected this claim finding (1) to the extent that the agreements ban cruel and unusual punishment, the United States has included express reservations preserving the right to impose the death penalty within the limits of the United States Constitution, and (2) the agreements are not binding on courts of the United States. Buell v. Mitchell, 274 F.3d at 372. In so holding, the court reasoned:

> These agreements [the American Declaration of the Rights and Duties of Men and the International Covenant on Civil and Political Rights] do not prohibit the death penalty. . . . Moreover, the United States has approved each agreement with reservations that preserve the power of each of the several states and of the United States, under the Constitution.
>
> Neither the OAS Charter nor the American Declaration specifically prohibit capital punishment. *See* State v. Phillips, 74 Ohio St3d. 72, 656 N.E.2d 643, 671 (1995). Furthermore, the United States Senate approved the OAS Charter with the reservation that 'none of its provisions shall be considered as . . . limiting the powers of the several states . . . with respect to any matters recognized under the Constitution as being within the reserved powers of the several states.' Charter of the Organization of American States, 1951, 2 U.S.T. 2394, 2484.
>
> . . .

> [T]he International Covenant does not require its member countries to abolish the death penalty. Article 7 of the International Covenant prohibits cruel, inhumane, or degrading punishment. . . . The United States agreed to abide by this prohibition only to the extent that the Fifth, Eighth, and Fourteenth Amendments ban cruel and unusual punishments. *See* 138 Cong. Rec. S-4781-01, S4783 (1992) ("That the Untied States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."); *see also* Jamison v. Collins, 100 F. Supp.2d 647, 766 (S.D. Ohio 2000) (citing Christy A. Short, Comment, *The Abolition of the Death Penalty*, 6 Ind. J. Global Legal Stud. 721, 725-26, 730 (1999)).
>
> Moreover, the International Covenant specifically recognizes the existence of the death penalty. . . .
>
> Finally, we note that even if the agreements were to ban the imposition of the death penalty, neither is binding on federal courts. 'Courts in the United States are bound to give effect to international law and to international agreements, except that a 'non-self-executing' agreement will not be given effect as law in the absence of necessary authority.' Restatement (Third) of Foreign Relations Law § 111 (1987). Neither the American Declaration nor the International Covenant is self-executing, nor has Congress enacted implementing legislation for either agreement. *See* Garza v. Lappin, 253 F.3d 918, 923 (7th Cir. 2001) (stating that the "American Declaration . . . is an aspirational document which . . . did not on its own create any enforceable obligations on the part of any of the OAS member nations"); Beazley v. Johnson, 242 F.3d 248, 267-68 (5th Cir. 2001)(citing cases and other sources indicating that the International Covenant is not self-executing); Hawkins, 33 F. Supp.2d at 1257 (noting that Congress has not enacted implementing legislation for the International Covenant).

Buell v. Mitchell, 274 F.3d at 371-72.

As in the present case, the defendant in Buell v. Mitchell additionally asserted that the Ohio death penalty violates customary international law. The Sixth Circuit rejected this argument also. The court held:

> The prohibition of the death penalty is not so extensive and virtually uniform among the nations of the world that it is a customary international norm. This is confirmed by the fact that large numbers of countries in the world retain the death penalty. Indeed, it is impossible to conclude that the international community as a whole recognizes the prohibition of the death penalty, when as of 2001, 147

> states were parties to the International Covenant, which specifically recognize the existent of the death penalty.

Buell v. Mitchell, 274 F.3d at 373(internal citations omitted).

> Moreover, since the abolition of the death penalty is not a customary norm or international law, it cannot have risen to the level that the international community as a whole recognizes as *jus cogens*, or a norm from which no derogation is permitted. Therefore, we cannot conclude that the abolition of the death penalty is a customary norm of international law or that it has risen to the higher status of *jus cogens*.

Id. at 373. The court additionally advised

> We believe that in the context of this case, where customary international law is being used as a defense against an otherwise constitutional action, the reaction to any violation of customary international law is a domestic question that must be answered by the executive and legislative branches. We hold that the determination of whether customary international law prevents a State from carrying out the death penalty, when the State otherwise is acting in full compliance with the Constitution, is a question that is reserved to the executive and legislative branches of the United States government, as it [is] their constitutional role to determine the extent of this country's international obligations and how best to carry them out.

Id. at 375-76 (footnote omitted).

The clear weight of federal and state authority dictates that no customary or international law or international treaty prohibits the State of Tennessee from invoking the death penalty as a punishment for certain crimes. *See* Stanford v. Kentucky, 492 U.S. 361, 109 S. Ct. 2969 (1989); White v. Johnson, 79 F.3d 432, 439 (5th Cir. 1996); Buell v. Mitchell, 274 F.3d at 337; United Mexican States v. Woods, 126 F.3d 1220, 1223 (9th Cir. 1997); United States v. Bin Laden, 126 F. Supp. 2d 290, 294-95 (S.D.N.Y. 2001) (United States is not a party to any treaty that prohibits capital punishment, per se, and total abolishment of capital punishment has not yet risen to the level of customary international law); Faulder v. Johnson, 99 F. Supp. 2d 774, 777 (S. D. Tex,), *aff'd*, 178 F.3d 741 (5th Cir. 1999) (In signing Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and International Covenant on Civil and Political Rights, United States made reservation stating that it understood language to mean cruel and unusual punishment as defined by the Eighth Amendment, which does not prohibit the death penalty); Jamison, 100 F. Supp.2d at 766; Workman v. Sundquist, 135 F. Supp.2d 871 (M.D. Tenn. 2001); People v. Ghent, 43 Cal.3d 739, 778-79, 239 Cal. Rptr. 82, 739 P.2d 1250 (1987); State v. Gary W. Kleypas, 40 P.3d 139 (Kan. 2001); Domingues v. Nevada, 114 Nev. 783, 785, 961 P.2d 1279 (1998); New Jersey v. Nelson, 155 N.J. 487, 512, 715 A.2d 281 (1998); State v. Phillips, 656 N.E.2d 643,

671 (Ohio 1995); Hinojosa v. Texas, 4 S.W.3d 240, 252 (Tex. Crim. 1999). We join in the conclusions reached by our sister courts. For these reasons, we reject Defendant's contentions and conclude that Defendant is not entitled to relief on this issue.

VI. Constitutionality of Tennessee Death Penalty Statutes

Defendant raises numerous challenges to the constitutionality of Tennessee's death penalty provisions. Included within his challenge that the Tennessee death penalty statutes violate the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and Article I, Sections 8, 9, 16, and 17, and Article II, Section 2 of the Tennessee Constitution are the following:

> 1. Tennessee's death penalty statutes fail to meaningfully narrow the class of death eligible defendants, specifically, the statutory aggravating circumstances set forth in Tennessee Code Annotated section 39-2-203(i)(2), (i)(5), (i)(6), and (i)(7) have been so broadly interpreted whether viewed singly or collectively, fail to provide such a "meaningful basis" for narrowing the population of those convicted of first degree murder to those eligible for the sentence of death. We note that factors (i)(5), (i)(6) and (i)(7) do not pertain to this case as they were not found by the jury. Thus, any individual claim with respect to these factors is without merit. *See, e.g.*, Hall, 958 S.W.2d at 715; Brimmer, 876 S.W.2d at 87. Also, this argument has been rejected by our supreme court. *See* Vann, 976 S.W.2d at117-118(Appendix); State v. Keen, 926 S.W.2d 727, 742 (Tenn. 1994).
>
> 2. The death sentence is imposed capriciously and arbitrarily in that
>
> (a) Unlimited discretion is vested in the prosecutor as to whether or not to seek the death penalty. This argument has been rejected. *See* State v. Hines, 919 S.W.2d 573, 582 (Tenn.1995), *cert. denied*, 519 U.S. 847, 117 S. Ct. 133 (1996).
>
> (b) The death penalty is imposed in a discriminatory manner based upon economics, race, geography, and gender. This argument has been rejected. *See* Hines, 919 S.W.2d at 582; State v. Brimmer, 876 S.W.2d 75, 87 (Tenn.), *cert. denied*, 513 U.S. 1020, 115 S. Ct. 585 (1994); State v. Cazes, 875 S.W.2d 253, 268 (Tenn. 1994); State v. Smith, 857 S.W.2d 1, 23 (Tenn.), *cert. denied*, 510 U.S. 996, 114 S. Ct. 561 (1993).
>
> (c) There are no uniform standards or procedures for jury selection to insure open inquiry concerning potentially prejudicial subject matter. This argument has been rejected. *See* State v. Caughron, 855 S.W.2d 526, 542 (Tenn.), *cert. denied*, 510 U.S. 979, 114 S. Ct. 475 (1993).

(d) The death qualification process skews the make-up of the jury and results in a relatively prosecution prone guilty-prone jury. This argument has been rejected. *See* State v. Teel, 793 S.W.2d 236, 246 (Tenn.), *cert. denied*, 498 U.S. 1007, 111 S. Ct. 571 (1990); State v. Harbison, 704 S.W.2d 314, 318 (Tenn.), *cert. denied*, 470 U.S. 1153, 106 S. Ct. 2261 (1986).

(e) Defendants are prohibited from addressing jurors' popular misconceptions about matters relevant to sentencing, i.e., the cost of incarceration versus cost of execution, deterrence, and method of execution. This argument has been rejected. *See* Brimmer, 876 S.W.2d at 86-87; Cazes, 875 S.W.2d at 268; State v. Black, 815 S.W.2d 166, 179 (Tenn. 1991).

(f) The jury is instructed that it must agree unanimously in order to impose a life sentence, and is prohibited from being told the effect of a non-unanimous verdict. This argument has been rejected. *See* Brimmer, 876 S.W.2d at 87; Cazes, 875 S.W.2d at 268; Smith, 857 S.W.2d at 22-23.

(g) Requiring the jury to agree unanimously to a life verdict violates Mills v. Maryland and McKoy v. North Carolina. This argument has been rejected. *See* Brimmer, 876 S.W.2d at 87; State v. Thompson, 768 S.W.2d 239, 250 (Tenn. 1989); State v. King, 718 S.W.2d 241, 249 (Tenn. 1986), *superseded by statute as recognized by*, State v. Hutchinson, 898 S.W.2d 161 (Tenn. 1994).

(h) There is a reasonable likelihood that jurors believe they must unanimously agree as to the existence of mitigating circumstances because of the failure to instruct the jury on the meaning and function of mitigating circumstances. This argument has been rejected. *See* Thompson, 768 S.W.2d 2at251-52.

(i) The jury is not required to make the ultimate determination that death is the appropriate penalty. This argument has been rejected. *See* Brimmer, 876 S.W.2d at 87; Smith, 857 S.W.2d at 22.

(j) The defendant is denied final closing argument in the penalty phase of the trial. This argument has been rejected. *See* Brimmer, 876 S.W.2d at 87; Cazes, 875 S.W.2d at 269; Smith, 857 S.W.2d at 24; Caughron, 855 S.W.2d at 542.

(k) Permitting a capital defendant to waive introduction of mitigation evidence without permitting such evidence to be placed in the record for purposes of proportionality review renders the Tennessee death penalty statutes unconstitutional. In essence, Defendant argues that the United States Constitution requires the sentencer to consider mitigating evidence to reach a rational and individualized determination of the appropriate sentence; if a defendant refuses to present such evidence, the imposition of a sentence of death will be imposed

in a *per se* arbitrary and unreliable manner. Mitigating evidence is critical to the sentencer in a capital case. *See* Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669 (1986); Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954 (1978). However, one can choose to forego the presentation of mitigation evidence even over the contrary advice of counsel and warnings of the court. *See* Blystone v. Pennsylvania, 494 U.S. 299, 110 S. Ct. 1078 (1990); Silagy v. Peters, 905 F.2d 986, 1008 (7th Cir. 1990). The Supreme Court of the United States does not require a defendant to present mitigating evidence; rather, statements by the Court regarding the ability of a defendant to present such evidence are phrased permissively. *See, e.g.*, Blystone v. Pennsylvania, 494 U.S. at 307 n. 5, 110 S. Ct. at1083, n. 5; McClesky v. Kemp, 481 U.S. 279, 305-06, 107 S. Ct. 1756, 1774-75 (1987); Skipper v. South Carolina, 476 U.S. at 8, 106 S. Ct. at 1672-73; Eddings v. Oklahoma, 455 U.S. 104, 113-14, 102 S. Ct. 869, 876-77 (1982); Lockett v. Ohio, 438 U.S. at 604, 98 S. Ct. at 2964-65 . Indeed, the Eighth Amendment and evolving standards of decency neither require nor demand that an unwilling defendant present an affirmative penalty defense in a capital case. *See* State v. Smith, 993 S.W.2d 6, 13-14 (Tenn. 1999); People v. Bloom, 48 Cal.3d 1194, 774 P.2d 698, 718-719 (1989); Wallace v. State, 893 P.2d 504 (Okl. Crim. App. 1995); Hamblen v. State, 527 So.2d 800, 804 (Fla. 1988). Accordingly, the decision of a competent capital defendant not to present mitigating evidence does not deprive the State of its interests in seeing that his sentence was imposed in a constitutionally acceptable manner. *See* Smith, 993 S.W.2d at 14.

(l) Mandatory introduction of victim impact evidence and mandatory introduction of other crime evidence upon the prosecutor's request violates separation of powers and injects arbitrariness and capriciousness into capital sentencing. Section 39-13-204(c) provides that a trial court "shall" permit a victim's representative to testify before the jury in sentencing. Tenn. Code Ann. § 39-13-204(c). Defendant asserts that "[t]his legislation improperly infringes upon a trial court's power to conduct proceedings and is thus a violation of separation of powers." Additionally, Faulkner contends that the legislative mandate and the supreme court's decision in State v. Nesbit, 978 S.W.2d 872 (Tenn. 1998), "render death sentencing in Tennessee unconstitutional since this factor is rife with discrimination and violates equal protection guarantees of the state and federal constitutions." In essence, Defendant contends that the statutory provision amounts to an unauthorized intrusion upon the rulemaking power of the court.

Recently, in State v. Mallard, our supreme court discussed the role of the General Assembly and the Court regarding rules of evidence and procedure to be employed in court proceedings. Mallard, 40 S.W.3d 473, 481 (Tenn. 2001). Our Supreme Court explained:

The authority of the General Assembly to enact rules of evidence in many circumstances is not questioned by this Court. Its power in this regard, however,

> is not unlimited, and any exercise of that power by the legislature must inevitably yield when it seeks to govern the practice and procedure of the courts. Only the Supreme Court has the inherent power to promulgate rules governing the practice and procedure of the courts of this state, *see, e.g.*, State v. Reid, 981 S.W.2d 166, 170 (Tenn. 1998) ("It is well settled that Tennessee courts have inherent power to make and enforce reasonable rules of procedure."); *see also* Tenn. Code Ann. §§ 16-3-401, 402 (1994), and this inherent power "exists by virtue of the establishment of a Court and not by largess of the legislature," Haynes v. McKenzie Mem'l Hosp., 667 S.W.2d 497, 498 (Tenn. Ct. App. 1984). Furthermore, because the power to control the practice and procedure of the courts is inherent in the judiciary and necessary "to engage in the complete performance of the judicial function," *cf.* Anderson County Quarterly Court v. Judges of the 28th Judicial Cir., 579 S.W.2d 875, 877 (Tenn. Ct. App. 1978), this power cannot be constitutionally exercised by any other branch of government, *see* Tenn. Const. art. II, §2 ("No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted."). In this area, "[t]he court is supreme in fact as well as in name." *See* Barger v. Brock, 535 S.W.2d 337, 341 (Tenn. 1976).

Mallard, 40 S.W.3d at 480-81.

Notwithstanding, our Supreme Court recognized that circumstances arise where it is impossible to perfectly preserve the "theoretical lines of demarcation between the executive, legislative and judicial branches of government." Mallard, 40 S.W.3d at 481 (quoting Petition of Burson, 909 S.W.2d 768, 774 (Tenn. 1995)). Noting the interdependency of the three branches of government, the supreme court acknowledged the "broad power of the General Assembly to establish rules of evidence in furtherance of its ability to enact substantive law." Mallard, 40 S.W.3d at 481 (citing Daugherty v. State, 216 Tenn. 666, 393 S.W.2d 739, 743 (1965)). However, the legislature's enactment of rules for use in the courts of this state must be confined to those areas that are appropriate to the exercise of that power. *Id.* Additionally, the court acknowledged the judiciary's acceptance of procedural or evidentiary rules promulgated by the General Assembly where the legislative enactments (1) are reasonable and workable within the framework already adopted by the judiciary, and (2) work to supplement the rules already promulgated by the Supreme Court. *Id.* (citing Newton v. Cox, 878 S.W.2d 105, 112 (Tenn. 1994)). In so holding, the court stated that "[t]his Court has long held the view that comity and cooperation among the branches of government are beneficial to all, and consistent with constitutional principles, such practices are desired and ought to be nurtured and maintained." *Id.*

Effective, July 1, 1998, Section 39-13-204(c), Tennessee Code Annotated, was amended to include the following language:

> In all cases where the state relies upon the aggravating factor that the defendant was previously convicted of one (1) or more felonies, other than the present

> charge, whose statutory elements involve the use of violence to the person, **either party shall be permitted to introduce evidence concerning the facts and circumstances of the prior conviction**. Such evidence shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury and shall not be subject to exclusion on the ground that the probative value of such evidence is outweighed by prejudice to either party. Such evidence shall be used by the jury in determining the weight to be accorded the aggravating factor. The **court may permit a member or members, or a representative or representatives of the victim's family to testify at the sentencing hearing about the victim and about the impact of the murder on the family of the victim and other relevant persons**. Such **evidence may be considered by the jury** in determining which sentence to impose. The court shall permit members or representatives of the victim's family to attend the trial, and those persons shall not be excluded because the person or persons shall testify during the sentencing proceeding as to the impact of the offense.

(Emphasis added).

As of the effective date of the amendment, the supreme court had not yet filed its decision in State v. Nesbit. Nesbit was decided and released on September 28, 1998. Nesbit held that Tennessee's capital sentencing statute authorizes the admission of victim impact evidence as "one of those myriad factors encompassed within the statutory language nature and circumstances of the crime." Nesbit, 978 S.W.2d at 890.

We do not presume that the legislature intended to usurp the role of the courts in exercising the judicial power of the state. Nor do we presume that the legislature intended to infringe upon the proper exercise of the judicial power in this state. Rather, we interpret the legislature's action in amending section 39-13-204(c) as supplementing the operation of the Rules of Evidence. The use of the word "shall" is generally mandatory, but in the present context is not inflexible. The statute does not indicate what weight should be given to the evidence nor does it indicate what sentence should be imposed. Moreover, regarding victim impact, the statute provides that the trial court "may" permit introduction of said evidence. Consequently, the contested language does not impermissibly infringe upon the powers of the court.

Our conclusion is advocated by the position of our supreme court on this very subject. Indeed, our supreme court has made clear that "the rules of evidence do not limit the admissibility of evidence in a capital sentencing proceeding." State v. Stout, 46 S.W.3d 689, 702 (Tenn. 2001) (citing Van Tran v. State, 6 S.W.3d 257, 271 (Tenn. 1999)). The supreme court has interpreted section 39-13-204(c) as permitting "trial judges wider discretion than would normally be allowed under the Tennessee Rules of Evidence in ruling on the admissibility of evidence at a capital sentencing hearing." Stout, 46 S.W.3d at 703 (quoting State v. Sims, 45 S.W.3d 1, 14 (Tenn. 2001)). To further exemplify the supreme court's acceptance of the legislature's action in this area, we restate the following principles adopted by our supreme court in State v. Sims:

> The Rules of Evidence should not be applied to preclude introduction of otherwise reliable evidence that is relevant to the issue of punishment, as it relates to mitigating or aggravating circumstances, the nature and circumstances of the particular crime, or the character and background of the individual defendant. As our case history reveals, however, the discretion allowed judges and attorneys during sentencing in first degree murder cases is not unfettered. Our constitutional standards require inquiry into the reliability, relevance, value and prejudicial effect of sentencing evidence to preserve fundamental fairness and protect the rights of both the defendant and the victim's family. The rules of evidence can in some instances be helpful guides in reaching these determinations of admissibility. Trial judges are not, however, required to adhere strictly to the rules of evidence. These rules are too restrictive and unwieldy in the arena of capital sentencing.

Stout, 46 S.W.3d at 703 (citing Sims, 45 S.W.3d at 14). Accordingly, we conclude that the 1998 amendment to section 39-13-204(c), Tennessee Code Annotated, does not violate the separation of powers clauses of either the Constitution of the State of Tennessee nor the Constitution of the United States of America.

> 3. The appellate review process in death penalty cases is constitutionally adequate. *See* Cazes, 875 S.W.2d at 270-71; Harris, 839 S.W.2d at 77. Moreover, the supreme court has held that, "while important as an additional safeguard against arbitrary or capricious sentencing, comparative proportionality review is not constitutionally required." *See* State v. Bland, 958 S.W.2d 651, 663 (Tenn. 1997), *cert. denied*, 523 U.S. 1083, 118 S. Ct. 1536 (1998).

VII. Review Pursuant to Tenn. Code Ann. § 39-13-206(c)

For a reviewing court to affirm the imposition of a death sentence, Tennessee Code Annotated section 39-13-206(c)(1) requires a determination that:

(1) the sentence was not imposed in an arbitrary fashion;
(2) the evidence supports the jury's finding of statutory aggravating circumstance(s);
(3) the evidence supports the jury's finding that the aggravating circumstances outweigh any mitigating circumstances; and
(4) the sentence is not excessive or disproportionate to the penalty imposed in similar cases.

Tenn. Code Ann. § 39-13-206(c)(1). The sentencing phase in the present case was conducted pursuant to the procedure established in the applicable statutory provisions and rules of criminal procedure. We conclude that the sentence of death, therefore, was not imposed in an arbitrary fashion. Moreover, the evidence indisputably supports aggravating circumstances (i)(2) (the

Defendant was previously convicted of one or more felonies which involved the use or threat of violence to the person).

Additionally, this Court is required by section 39-13-206(c)(1)(D), Tennessee Code Annotated, and under the mandates of State v. Bland, 958 S.W.2d 651, 661-674 (Tenn. 1997), *cert. denied*, 523 U.S. 1083, 118 S. Ct. 1536 (1998) to consider whether the Defendant's sentence of death is disproportionate to the penalty imposed in similar cases. *See* State v. Godsey, 60 S.W.3d 759, 781-82 (Tenn. 2001). The comparative proportionality review is designed to identify aberrant, arbitrary, or capricious sentencing by determining whether the death penalty in a given case is "disproportionate to the punishment imposed on others convicted of the same crime." Stout, 46 S.W.3d at 706 (citing Bland, 958 S.W.2d at 662 (quoting Pulley v. Harris, 465 U.S. 37, 42-43, 104 S. Ct. 871, 875 (1984)). If a case is "plainly lacking in circumstances consistent with those in cases where the death penalty has been imposed," then the sentence is disproportionate." Stout, 46 S.W.3d at 706 (citations omitted).

In conducting our proportionality review, this Court must compare the present case with cases involving similar defendants and similar crimes. *See* Stout, 46 S.W.3d at 706 (citation omitted); *see also* Terry v. State, 46 S.W.3d 147, 163 (Tenn. 2001)(citations omitted). We select only from those cases in which a capital sentencing hearing was actually conducted to determine whether the sentence should be life imprisonment, life imprisonment without the possibility of parole, or death. *See* State v. Carruthers, 35 S.W.3d 516, 570 (Tenn. 2000), *cert. denied*, 533 U.S. 953, 121 S. Ct. 2600 (2001) (citations omitted); *see also* Godsey, 60 S.W.3d at 783. We begin with the presumption that the sentence of death is proportionate with the crime of first-degree murder. *See* Terry, 46 S.W.3d at 163 (citing State v. Hall, 958 S.W.2d 679, 799 (Tenn.), *cert. denied*, 524 U.S. 941, 118 S. Ct. 2348 (1998)). This presumption applies only if the sentencing procedures focus discretion on the "'particularized nature of the crime and the particularized characteristics of the individual defendant.'" Terry, 46 S.W.3d at 163 (citing McCleskey v. Kemp, 481 U.S. 279, 308, 107 S. Ct. 1756 (1987) (quoting Gregg v. Georgia, 428 U.S. 153, 206, 96 S. Ct. 2909 (1976))).

Applying this approach, the Court, in comparing this case to other cases in which the defendants were convicted of the same or similar crimes, looks at the facts and circumstances of the crime, the characteristics of the defendant, and the aggravating and mitigating factors involved. *See* Terry, 46 S.W.3d at 164. Regarding the circumstances of the crime itself, numerous factors are considered including: (1) the means of death, (2) the manner of death, (3) the motivation for the killing, (4) the place of death, (5) the victim's age, physical condition, and psychological condition, (6) the absence or presence of provocation, (7) the absence or presence of premeditation, (8) the absence or presence of justification, and (9) the injury to and effect on non-decedent victims. Stout, 46 S.W.3d at 706 (citing Bland, 958 S.W.2d at 667); *see also* Terry, 46 S.W.3d at 164. Contemplated within the review are numerous factors regarding the defendant, including: (1) prior criminal record, (2) age, race, and gender, (3) mental, emotional, and physical condition, (4) role in the murder, (5) cooperation with authorities, (6) level of remorse, (7) knowledge of the victim's helplessness, and (8) potential for rehabilitation. Stout, 46 S.W.3d at 706; Terry, 46 S.W.3d at 164.

In completing our review, we remain cognizant of the fact that "no two cases involve identical circumstances." *See generally* Terry, 46 S.W.3d at 164. Accordingly, there is no mathematical or scientific formula to be employed. *See* State v. Richard Hale Austin, No. W1999-00281-CCA-R3-DD. Thus, our function is not to limit our comparison to those cases where a death sentence "is perfectly symmetrical," but rather, our objective is only to "identify and to invalidate the aberrant death sentence." Terry, 46 S.W.3d at 164 (citing Bland, 958 S.W.2d at 665).

The circumstances surrounding the murder in light of the relevant and comparative factors reveal that just after midnight on Friday, January 22, 1999, Defendant, brandishing a frying pan and horseshoe, repeatedly struck his estranged wife, Shirley, repeatedly across the head. Indeed, an autopsy revealed that there were at least thirteen injuries centered about the head during the attack lasting over six minutes. Additionally, the attack was committed while the victim was on the floor. The previous evening, Shirley had made a complaint against Defendant to the Memphis Police Department. Specifically, Shirley Faulkner reported that Defendant had struck her with his fist. Defendant also threatened to kill Mrs. Faulkner. This statement was verified by the presence of swelling on the left side of the victim's face. Evidence was further introduced demonstrative of the victim's fear of Defendant. Two days after the murder, Defendant turned himself in to authorities at the Shelby County Sheriff's Department.

Defendant was previously convicted of one count of second-degree murder and four counts of robbery in 1984. Additionally, Defendant was convicted of assault with intent to commit murder in the first-degree, assault with intent to commit robbery, and assault with intent to commit voluntary manslaughter. These convictions all occurred in 1976. Evidence was presented establishing that Defendant was subject to quite a deal of neglect and abuse. His parents were alcoholics and one parent abused drugs. As a result, Defendant was placed in foster home situations. As an adult, Defendant developed a drug addiction, involving the use of cocaine, marijuana and alcohol. A psychologist determined that Defendant had a predisposition toward impulsive behavior that was aggravated by stressors, e.g., marital difficulties and suicide of close friend. Indeed, the psychologist concluded that Defendant was capable of flying into a rage and, under states of emotion, acts before he thinks.

While no two capital cases and no two capital defendants are alike, we have reviewed the circumstances of the present case with similar first-degree murder cases and conclude that the penalty imposed in the present case is not disproportionate to the penalty imposed in similar cases. The sentence of death has been upheld in cases where the defendant had killed an estranged wife or girlfriend in a domestic violence context. *See, e.g.*, State v. Suttles, 30 S.W.3d 252 (Tenn. 2000) (defendant stabbed estranged girlfriend in Taco Bell parking lot; (i)(2) and (i)(5) aggravating circumstances); State v. Keough, 18 S.W.3d 175 (Tenn. 2000) (after arguing in a bar, defendant followed his estranged wife outside; stabbed her with a knife and left her to bleed to death inside the car; (i)(2) only aggravating factor); State v. Hall, 8 S.W.3d 593 (Tenn.1999) (beating, strangulation and drowning death of estranged wife; children were present during part of the assault; one of the aggravating circumstances was (i)(5)); State v. Hall, 958 S.W.2d 679 (Tenn.1997) (angered by his girlfriend's decision to leave him, the defendant searched for her, and set fire to her car when she was

inside; aggravating circumstance (i)(5) was found); State v. Smith, 868 S.W.2d 561 (Tenn.1993) (killing of estranged wife, aggravating circumstance (i)(5) was found); State v. Johnson, 743 S.W.2d 154 (Tenn.1987) (killing of estranged wife by suffocation, aggravating circumstances (i)(2) and (i)(5) were present); State v. Cooper, 718 S.W.2d 256 (Tenn.1986) (defendant deliberately shot estranged wife after threatening her and stalking her for some time; aggravating circumstance (i)(5) was found). Additionally, the sentence of death has consistently been found proportionate where only one aggravating factor is found. *E.g.*, State v. Sledge, 15 S.W.3d 93 (Tenn.), *cert. denied*, 531 U.S.889, 121 S. Ct. 211 (2000) (prior violent felony); Hall, 8 S.W.3d at 593 (heinous atrocious, cruel); State v. Middlebrooks, 995 S.W.2d 550 (Tenn. 1999) (heinous, atrocious, cruel); State v. Matson, 666 S.W.2d 41 (Tenn.), *cert. denied*, 469 U.S. 873, 105 S. Ct. 225 (1984) (felony murder); State v. Caldwell, 671 S.W.2d 459 (Tenn.), *cert. denied*, 469 U.S. 873, 105 S. Ct. 231 (1984) (prior violent felony).

Although a lesser sentence has been imposed in similar cases involving the killing of estranged wives or girlfriends, these cases are distinguishable in that the defendant had not been previously convicted of violent felony offenses. *See, e.g.*, State v. Dick, 872 S.W.2d 938 (Tenn. Crim. App.1993); State v. Weems, No. 02C01-9401-CR-00011 (Tenn. Crim. App. at Jackson, July 26, 1996); State v. King, C.C.A. No. 4 (Tenn. Crim. App. at Jackson, Feb. 10, 1988). Moreover, our function is not to invalidate a death sentence merely because the circumstances may be similar to those in which a defendant received a less severe sentence. Instead, our review requires a determination of whether a case plainly lacks circumstances found in similar cases where the death penalty has been imposed. Bland, 958 S.W.2d at 665.

Our review of these cases reveals that the sentence of death imposed upon Defendant is proportionate to the penalty imposed in similar cases. In so concluding, we have considered the entire record and reach the decision that the sentence of death was not imposed arbitrarily, that the evidence supports the finding of the (i)(2) aggravator, that the evidence supports the jury's finding that the aggravating circumstance outweighs mitigating circumstances beyond a reasonable doubt, and that the sentence is not excessive or disproportionate.

X. Conclusion

Having fully reviewed the record, the briefs and the applicable authority, we affirm the Defendant's conviction of first degree murder. Additionally, in accordance with the mandate of section 39-13-206(c)(1), Tennessee Code Annotated, and the principles adopted in prior decisions of the Tennessee Supreme Court, we have considered the entire record in this cause and find the sentence of death was not imposed in any arbitrary fashion, that the evidence supports, as previously discussed, the jury's finding of the statutory aggravating circumstance, and that the jury's finding that the aggravating circumstance outweighed mitigating circumstances beyond a reasonable doubt. Tenn. Code Ann. § 39-13-206(c)(1)(A)(C). A comparative proportionality review, considering both "the nature of the crime and the defendant," convinces us that the sentence of death is neither excessive nor disproportionate to

the penalty imposed in similar cases. Accordingly, we affirm the sentence of death imposed by the trial court.

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THOMAS T. WOODALL, JUDGE